No. 1013

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15,884

CIVIL.

JOSEPH E. BOVEY, WARDEN,
NEBRASKA STATE PENITENTIARY, APPELLANT,

vs.

LOYD CARROLL GRANDSINGER, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA.

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E. E. KOCH

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[fol. 1] Application for a Writ of Habeas Corpus.

In The District Court Of The United States
For The District Of Nebraska
Lincoln Division

Loyd Carroll Grandsinger, Petitioner,
No. 0265. vs. Civil.
Joseph E. Bovey, Warden, Nebraska State Penitentiary,
Respondent.

Your petitioner, Loyd Carroll Grandsinger, respectfully represents and shows to the Court as follows:

I.

Petitioner is now unlawfully imprisoned and deprived of his liberty by Joseph E. Bovey, Warden of the Nebraska State Penitentiary, Lincoln, Nebraska, in the Lincoln Division of the District of Nebraska.

II.

Petitioner is imprisoned and restrained under and by virtue of a pretended judgment and sentence of death entered by the District Court of Cherry County, State of Nebraska on June 16, 1954, in the case entitled "State of Nebraska vs. Loyd Carroll Grandsinger," which judgment and sentence orders that petitioner, Loyd Carroll Grandsinger, be put to death by electrocution. Said sentence of death is now scheduled to take place December 28, 1956.

III.

The above described judgment and sentence was and is null and void because during the trial a conflict of interest arose which destroyed petitioner's trial counsel's ability effectively to represent petitioner. Due to this conflict of

interest petitioner was deprived of the effective and unqualified representation of counsel which the Fourteenth Amendment to the United States Constitution commands to be afforded to a defendant in a state capital case.

The deprivation of the right of counsel arose for the following reasons:

(a) Petitioner alleges that during the course of his trial for first degree murder in the District Court for Cherry County, Nebraska, the State of Nebraska introduced into evidence a belt allegedly worn by the victim; that said belt allegedly contained a hole which the State of Nebraska contended was made by the fatal bullet; that the State of Nebraska sought by expert testimony to prove that the hole could have been made only by a .22 caliber size bullet; that such evidence was important to the State's case; and that the Court impressed the importance of the Exhibit upon the jury and warned them merely to examine but not to probe at the hole.

(b) Petitioner further alleges that on the tenth day of the trial, when the proceedings had reached the crucial stage at which final arguments of counsel were to be made to the jury, petitioner's Chief Defense Counsel was caught in the act of attempting to enlarge the size of the hole in the said belt by pushing a tapered dowel stick through it, said misconduct occurring after the exhibits had been brought into the courtroom but before court had actually convened.

[fol. 2] (c) Petitioner further alleges that his counsel caused or permitted counsel's gross misconduct to be brought to the jury's attention, as shown by the following proceedings which took place when the court convened a few moments later:

By Mr. Clark [special prosecutor]:

Before we proceed with the arguments, Your Honor, there is a matter that has been taken up with, Your Honor, which we wish to get into the record.

The Court: Very well.

Mr. Clarke: We wish the record to show that counsel for the defendant, is willing that it shall show, that this morning [sic] in this court room, after the court reporter had brought all the exhibits in the case out and laid them on the reporter's desk, Mr. Fisher, one of the counsel for the defendant, while he was examining Exhibit No. 10, being the leather pants belt heretofore identified as the belt of Marvin Hansen, and that at that time he took a dowel, being one of the wooden dowels on the reporter's desk, and being either the same or one exactly like the one I am holding in my hand, which I will have to have marked as an exhibit, and pushed it violently—

Mr. Fisher: (Interrupting) I didn't violently push it—

Mr. Clarke: (Interrupting) pushed it through the hole in the belt hard enough so that it materially enlarged the size of the hole to an extent which cannot now be determined and that the belt, Exhibit No. 10, is not now in the same condition as it was when it was offered in evidence and received in evidence, and that the hole is now materially larger than it was before Mr. Fisher did that.

(Mark this dowel as an exhibit, please.)

(The wooden dowel referred to was marked as Exhibit No. 75.)

The Court: Mr. Fisher, as I understand it you have told counsel that you did that?

Mr. Fisher: Yes.

The Court: You recognize that the hole is larger?

Mr. Fisher: Yes.

(d) Petitioner further alleges that his counsel's confessed willingness to have this conduct brought to the jury's attention was a flagrant violation of the duties counsel owed to petitioner; that petitioner's defense was and is that he is innocent, and that at the time this misconduct took place the jury was going to have to resolve conflicting evidence and, in the event of a guilty verdict, determine whether or not to impose the death penalty; that defense

counsel must have known how prejudicial it would be to petitioner's rights to have the jury diverted from the grave and difficult duties it faced to the gross misconduct of counsel; but that defense counsel nonetheless made no effort to protect petitioner's right.

(e) Petitioner further alleges that his counsel was diverted from his duty to use all honorable means to present facts and arguments in behalf of petitioner and to abide by the Canons of Professional Ethics of the Legal Profession because of a conflict of interest created when his mis-[fol. 3] conduct was discovered and he therefore faced the prospect of criminal punishment, disbarment or other disciplinary action, or economic loss; and that counsel resolved this conflict of interest by cooperating with court and prosecutor in order to protect himself, in utter disregard of his duties to petitioner, whose own life was then in jeopardy.

(f) Petitioner further alleges that the foregoing acts of misconduct were done without petitioner's knowledge at any time and without his consent or authorization, express or implied.

IV.

The above described judgment and sentence was and is void for the reason that purported confessions of petitioner were received in evidence and used to influence the jury notwithstanding the fact that the purported confessions were coerced and their use violated petitioner's rights under the due process clause of the Fourteenth Amendment to the United States Constitution.

These purported confessions were coerced and their admission in evidence was a violation of petitioner's constitutional rights for the following reasons:

(1) Prior to the time petitioner was apprehended he was physically, emotionally and mentally exhausted, having gone without food for twenty-four hours and without sleep for a similar or longer period. Petitioner had nearly drowned and was in no condition to undergo a long and intensive period of questioning.

(2) Petitioner was threatened, intimidated, and physically abused by officers of the state, Cherry County, and other members of the posse which captured him on Friday afternoon, April 9, 1954.

(3) Petitioner was immediately taken to Valentine, Nebraska, for questioning and was frightened by a large mob, milling about the place of questioning.

(4) On Friday evening, April 9, 1954, petitioner signed a purported confession after having been threatened, physically abused, and interrogated at great length by police officers.

(5) Petitioner at later times made other purported confessions which were used at the trial as a basis for the judgment and sentence of death now imposed upon petitioner. Petitioner alleges that these confessions were false, and were the result of further physical disabuse, threats, intimidations, and long and intensive questioning lasting for many hours, which made petitioner confess out of fear for his life.

(6) Petitioner alleges that he was held incommunicado from the time of his arrest on Friday afternoon, April 9, 1954, until at least Wednesday, April 14, 1954, and that despite attempts by friends, relatives and others to contact petitioner, he, petitioner, was not permitted to secure legal counsel or to consult with and obtain the [advise] of friends and relatives.

(7) Petitioner further alleges that he was not promptly given a preliminary hearing as required by the law of the State of Nebraska.

[fol. 4]

V.

Petitioner has exhausted all remedies available to him in the courts of the State of Nebraska, but such courts have failed and refused to order petitioner's release from his unlawful imprisonment, or to grant him a new trial.

VI.

Wherefore, petitioner prays that a Writ of Habeas Corpus issue and be directed to said Joseph E. Bovey, Warden

of the Nebraska State Penitentiary, commanding him to bring the body of petitioner, together with the cause of such imprisonment and restraint, forthwith before this Court, and that your petitioner be discharged from said unlawful imprisonment.

State of Nebraska
County of Lancaster—ss.:

Loyd Carroll Grandsinger petitioner above named, being first duly sworn deposes and says that he knows the contents of the foregoing Application and that the facts stated therein are true as he believes.

LOYD CARROLL GRANDSINGER
Lincoln, Nebr., Box 111

Subscribed and sworn to before me this 8th day of December, 1956.

JAMES A. LAKE, Sr.,
(Seal) Notary Public.

(Filed in U. S. District Court, Dec. 12, 1956.)

[fol. 5] (Order of District Court staying execution of Judgment and Sentence upon and against petitioner)

On this 12th day of December, 1956, upon the petitioner's written application filed herein for stay of execution of the judgment and sentence of death upon him heretofore pronounced until the final determination of this cause, the court finds that the petitioner is under sentence of death pronounced by a court of the State of Nebraska the date for the execution of which sentence is December 28, 1956; that it is impracticable and impossible, consistent with orderly procedure, finally to determine this proceeding on or prior to December 28, 1956, and that the prayer of the petitioner for a stay of execution of the judgment and sentence of death upon and against him until the final determination of this proceeding should be granted and allowed.

It Is, By The Court, Considered, Ordered And Adjudged:

1. That the execution of the judgment and sentence of death upon and against the defendant, the execution of which judgment and sentence is now set for December 28, 1956, be and it hereby is stayed until the final determination of this proceeding;

2. That pending and until the final determination of this proceeding the defendant be restrained and enjoined from executing or carrying into effect said judgment and sentence of death;

3. That a duly certified copy of this order be served by the United States Marshal upon the respondent on or [fol. 6] before December 15, 1956, and that a return be made showing such service;

4. That the clerk transmit forthwith copies of this order to the petitioner, to the respondent and to the Attorney General of Nebraska.

By The Court:

JOHN W. DELEHANT,
Judge, United States District Court.

(Filed in U. S. District Court, Dec. 12, 1956)

I certify this to be a true copy of the original record in my custody.

MARY A. MULLEN,
Clerk.

(Seal of U. S. District Court, District of Nebraska)

By Mary A. Mullen,
Clerk.

[fol. 7] (Order of District Court directing Respondent to show cause why a Writ of Habeas Corpus should not be issued)

On this 12th day of December, 1956, upon examination and inspection and upon due consideration of the Petition for Writ of Habeas Corpus filed by petitioner in this case,

It Is Hereby Ordered:

1. That the respondent be and he hereby is ordered to show cause by the 26th day of December, 1956 why a writ of habeas corpus should not be issued as prayed for; to set out in his return hereto a detailed showing as to the legal authority, if any, under which the petitioner is held in custody with any pertinent facts showing the lawful justification for such custody, and also with particularity the proceedings, if any, which the petitioner has taken and prosecuted in the courts and under the laws of Nebraska to obtain the relief now sought by him; and that the respondent shall serve or cause to be served upon the petitioner at, or prior to the time of filing thereof, a copy of such showing of cause as may be filed in pursuance of this order;

2. That the petitioner be and he hereby is granted and allowed a period of ten (10) days, after the date he is served with the respondent's return, within which to make and file a countershowing in opposition to such showing as respondent may make in pursuance of this order;

3. That a copy of this order be served by the United States Marshal upon the respondent on or before the 15th day of December, 1956, and that a due return be made showing such service;

4. That the clerk transmit forthwith copies of this order to the petitioner, to the respondent and to the Attorney [fol. 8] General of Nebraska.

By The Court:

/s/ JOHN W. DELEHANT,
Chief Judge, United States
District Court.

(Filed in U. S. District Court, Dec. 12, 1956)

[fol. 9] Return To Order To Show Cause.

(Filed in U. S. District Court, Dec. 26, 1956)

Comes now the respondent, upon whom has been served an order to show cause why a writ of habeas corpus should

not issue as prayed for, and making return to the said order respectfully shows to the court that the petitioner, Loyd Carroll Grandsinger, is in the custody of the respondent, as Warden of the Nebraska State Penitentiary, pursuant to the following legal authority:

1. On April 12, 1954, a complaint was filed in the County Court of Cherry County, Nebraska, charging the petitioner, under two counts, with the crime of first degree murder in the shooting of Marvin Hansen on or about April 8, 1954, in Cherry County, Nebraska. A copy of the complaint is attached hereto and made a part hereof, marked "Exhibit A." On April 12, 1954, a warrant for the arrest of petitioner was issued by the County Court of Cherry County, Nebraska. A copy of the warrant is attached hereto and made a part hereof, marked "Exhibit B."

2. On April 12, 1954, upon a preliminary hearing being held in the County Court of Cherry County, Nebraska, upon the complaint charging petitioner with murder in the first degree, the petitioner entered a plea of not guilty and waived preliminary hearing.

3. On May 7, 1954, an information was filed with the District Court of Cherry County, Nebraska, by William B. Quigley, Cherry County Attorney, charging the petitioner, under two counts, with the crime of murder in the first degree. A copy of said information is attached hereto and [fol. 10] made a part hereof, marked "Exhibit C."

4. On June 1, 1954, the petitioner, by his attorneys, Charles A. Fisher and William C. Heelan, filed a motion in the District Court of Cherry County, Nebraska, to quash count two of the information. A copy of said motion is attached hereto and made a part hereof, marked "Exhibit D." On that day, this motion was submitted to the District Court of Cherry County, Nebraska, upon consideration whereof the court sustained the motion and ordered the second count of the information quashed. A copy of the journal entry of the District Court of Cherry County, Nebraska, setting forth the proceedings had in that court is attached hereto and made a part hereof, marked "Exhibit E."

5. On June 2, 1954, the petitioner being present in the District Court of Cherry County, Nebraska, with his attorneys, Charles A. Fisher and William C. Heelan, he was brought to the bar of the court and the information was read to him, whereupon he entered a plea of not guilty, as shown by the copy of the journal entry marked "Exhibit E."

6. As shown by the attached copy of the journal entry of Cherry County, Nebraska, marked "Exhibit E", after the jury was empaneled and sworn, the trial proceeded on June 5, 7, 8, 9, 10, 11, 12, and 14, 1954, arguments of counsel were made on June 15, 1954, after which the jury retired to deliberate their verdict.

7. On June 16 1954, the petitioner being present in the District Court of Cherry County, Nebraska, accompanied by his counsel, and counsel for the State of Nebraska being present, the jury in open court returned a verdict finding the petitioner guilty of murder in the first degree and fixed the penalty at death. These proceedings are shown in the attached copy of the journal entry marked "Exhibit E." A copy of the verdict of the jury is also attached hereto and made a part hereof, marked "Exhibit F."

8. On June 16, 1954, the petitioner, by his attorneys Charles A. Fisher and William C. Heelan, filed a motion [fol. 11] for a new trial in the District Court of Cherry County, Nebraska, and on that day the motion for new trial was overruled. Thereupon, the cause came on for final judgment, the petitioner was informed of the verdict of the jury, and being asked whether he had anything to say why sentence and judgment should not be pronounced against him answered nothing to stay the sentence of the court. The trial court then ordered that the petitioner be taken by the Sheriff of Cherry County, Nebraska, to the Nebraska State Penitentiary, to be confined until the date fixed for his execution, and upon the date so fixed for his execution to be executed and put to death in the manner prescribed by law. The District Court of Cherry County, Nebraska, provided that October 15, 1954, was the day appointed for the execution of the petitioner. The peti-

tioner having given notice of his intention to apply for a writ of error, it was ordered by the District Court of Cherry County, Nebraska, that the execution of the sentence and judgment against petitioner be suspended for thirty days to give the petitioner a reasonable time to apply for such writ. The proceedings are shown, by the attached copy of the journal entry marked "Exhibit E." A copy of the commitment is attached hereto and made a part hereof, marked "Exhibit G." A copy of the court order suspending the execution of the sentence and judgment is attached hereto and made a part hereof, marked "Exhibit H."

9. On July 15, 1954, the petitioner filed a petition in error, application for suspension of sentence and for writ of error with the Supreme Court of Nebraska, and on that day, the Supreme Court of Nebraska ordered that the execution of the sentence and judgment against the petitioner be suspended until the further order of the court.

10. On December 16, 1955, the Supreme Court of Nebraska affirmed the judgment of the District Court of Cherry County, Nebraska, and Friday, March 30, 1956, between the hours of 6:00 a.m. and 6:00 p.m. of said day, was fixed as the date for carrying into effect the sentence of the District Court. A copy of the order is attached hereto [fol. 12] and made part hereof, marked "Exhibit I." The written opinion of the Supreme Court of Nebraska is reported in 161 Neb. 419, 73 N. W. 2d 632.

11. On January 5, 1956, petitioner filed a motion for rehearing with the Supreme Court of Nebraska, which was argued on January 14, 1956, and overruled on February 11, 1956. A copy of the order overruling the motion for rehearing is attached hereto and made a part hereof, marked "Exhibit J."

12. On February 13, 1956, the Supreme Court of Nebraska issued its mandate to the District Court of Cherry County, Nebraska, and a death warrant to the respondent commanding him to carry the sentence into execution on Friday, March 30, 1956, between the hours of 6:00 a.m. and 6:00 p.m. A copy of the mandate is attached hereto and

made a part hereof, marked "Exhibit K." A copy of this death warrant is attached hereto and made a part hereof, marked "Exhibit L."

13. On March 8, 1956, the petitioner filed a motion with the Supreme Court of Nebraska for recall of the mandate, and for a stay of the execution of the judgment. On that day petitioner also filed with the Supreme Court of Nebraska an application for stay pending appeal to the Supreme Court of the United States. A copy of the motion is attached hereto and made a part hereof, marked "Exhibit M," and a copy of the application is attached hereto and made a part hereof, marked "Exhibit N."

14. On March 17, 1956, the Supreme Court of Nebraska entered an order recalling the mandate issued on February 13, 1956, and an order staying proceedings until May 18, 1956. A copy of the order recalling the mandate is attached hereto and made a part hereof, marked "Exhibit O," and a copy of the order staying proceedings is attached hereto and made a part hereof, marked "Exhibit P."

15. The mandate so recalled was returned to the Supreme Court of Nebraska by the Clerk of the District Court of Cherry County, Nebraska, on March 20, 1956.

[fol. 13] 16. On April 30, 1956, petitioner filed with the Supreme Court of Nebraska a notice of dismissal of Charles A. Fisher as his counsel, and of retention of Eugene D. O'Sullivan, Sr. of Omaha, Nebraska, as his counsel. A copy of this notice is attached hereto and made a part hereof, marked "Exhibit Q." On that day, Eugene D. O'Sullivan Sr., 278 Aquila Court Building, Omaha 2, Nebraska, a member of the Bar of the State of Nebraska, filed his appearance for the petitioner in the Supreme Court of Nebraska. A copy of this appearance is attached hereto and made a part hereof, marked "Exhibit R."

17. On June 18, 1956, the petitioner, by his attorney, Eugene D. O'Sullivan, Sr., filed with the Supreme Court of Nebraska a motion for leave of court to file amended and supplemental motion and brief for rehearing and tender

of copy of said proferred filings. A copy of the motion is attached hereto and made a part hereof, marked "Exhibit S." On that day, the Supreme Court entered an order that the motion of petitioner for leave to file an amended and supplemental motion for rehearing be granted, and ordered that the said second motion for rehearing be heard on Saturday, June 23, 1956. A copy of this order is attached hereto and made a part hereof, marked "Exhibit T." In the brief filed on that day by the petitioner he argued that confessed criminal misconduct of chief defense counsel, Charles A. Fisher, deprived petitioner of the effective and unqualified representation of counsel required in state capital cases by the Fourteenth Amendment of the United States Constitution, and that he was denied a fair trial where the record shows that defense counsel was incompetent, engaged in criminal misconduct in the courtroom, and where the special prosecutor and the court forced defense counsel to confess his crimes and moral laxity in front of the jury. In this brief petitioner, by his counsel Eugene D. O'Sullivan, Sr., also presented that the argument that the use at the trial of all, or any one, of the three purported confessions obtained under the circumstances disclosed by [fol. 14] the transcript and bill of exceptions deprived him of his life and liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

18. This second motion for rehearing was argued before the Supreme Court of Nebraska on June 23, 1956, and on June 30, 1956, this motion was overruled. A copy of the order of the court is attached hereto and made a part hereof, marked "Exhibit U."

19. On May 3, 1956, an order was signed by the Honorable Tom C. Clark, Associate Justice of the Supreme Court of the United States, staying the execution of the sentence of death imposed upon the petitioner pending the final disposition of a petition for writ of certiorari to review the judgment of the Supreme Court of Nebraska. A copy of this order is attached hereto and made a part hereof, marked "Exhibit V."

20. On July 9, 1956, the petitioner, by his counsel, filed a petition for a writ of certiorari to the Supreme Court of the State of Nebraska with the Supreme Court of the United States. In this petition, the questions presented were as follows:

"1. Was petitioner, a defendant in a state capital case, denied due process under the Fourteenth Amendment to the United States Constitution:

(a) Where defense counsel was caught during the trial tampering with the evidence introduced in the case by the State, was forced to confess his criminal misconduct in open court before the jury, thereby debasing and disgracing himself and his much harried client, and thus placing himself in a situation in which his own interests in protecting his professional future were adverse to the duties he owed his client, and where this conflict of interest prevented him from giving petitioner effective and unqualified representation by counsel; and/or

(b) Where the exploitation of defense counsel's misconduct by the prosecutor and trial court, coupled with [fol.15] defense counsel's general incompetence, particularly in failing to make proper and adequate objections in preserving federal questions for review, and other misconduct of the prosecutor and the failure of the trial court to protect petitioner's essential rights, deprived petitioner of a fair trial.

"2. Did the admission and use of petitioner's confessions constitute a denial of due process under the Fourteenth Amendment of the United States Constitution."

21. On October 22, 1956, the United States Supreme Court entered an order denying the petition for writ of certiorari. A copy of the order is attached hereto and made a part hereof, marked "Exhibit W."

22. On October 26, 1956, the petitioner, by his counsel Eugene D. O'Sullivan, filed with the Supreme Court of Nebraska a motion to stay execution of sentence on mandate. A copy of this motion is attached hereto and made a part hereof, marked "Exhibit X."

23. On October 29, 1956, the Supreme Court issued a death warrant commanding the respondent to carry the sentence into execution on Friday, December 28, 1956, between the hours of 6:00 a.m. and 6:00 p.m. A copy of said death warrant is attached hereto and made a part hereof, marked "Exhibit Y."

24. Petitioner has not exhausted his state remedies in that he has never applied to the courts of the State of Nebraska for a writ of habeas corpus.

25. Petitioner has not exhausted his state remedies in that he has never applied to the courts of the State of Nebraska for a writ of error coram nobis.

26. The petition fails to state any facts which show that there is an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of petitioner.

27. The petition fails to state sufficient facts for the [fol. 16] granting of any relief by the Court.

Wherefore, for reasons hereinbefore set forth the respondent respectfully prays the court to discharge the order to show cause, and dismiss the petition for the said writ of habeas corpus.

JOSEPH B. BOVEY, Warden
Nebraska State Penitentiary,
Respondent.

State of Nebraska,
Lancaster County—ss.:

Joseph B. Bovey, being first duly sworn, on oath deposes and says that he is the Warden of the Nebraska State Penitentiary and respondent in the above-entitled matter; that he has read the above and foregoing return to the order to show cause, and that the facts and statements therein contained are true as he verily believes.

.....

Subscribed and sworn to before me this.....day of December, 1956.

.....
Notary Public

Acknowledgment of Service

Service of the above Return to Order to Show Cause and a receipt of two copies thereof acknowledged this .....day of December, 1956.

.....
Attorney for Petitioner

[fol. 17] Exhibit "A"

Complaint for First Degree Murder

State of Nebraska,
County of Cherry—ss.:

In The County Court Of Cherry County

The State Of Nebraska, Cherry County.

The State of Nebraska

#7440 vs.

Loyd Carroll Grandsinger

The Complaint and information of William B. Quigley, County Attorney of Cherry County aforesaid, made in the name of the State of Nebraska, before me, the undersigned County Judge, within and for said County of Cherry, State of Nebraska, this 12th day of April A.D. 1954, who being duly sworn, on oath says, that Loyd Carroll Grandsinger on or about the 8th day of April A.D. 1954, in the County of Cherry and State of Nebraska, then and there being did then and there feloniously, purposely, and of his deliberate and premeditated malice, shot Marvin Hansen with a pistol, and as a result of so being shot the said Marvin Hansen died on April 8, 1954; Defendant thus committed murder in the first degree.

Count Two

William B. Quigley being further duly sworn, on oath says, that Loyd Carroll Grandsinger on or about the 8th day of April, A.D. 1954, in the County of Cherry and State of Nebraska, then and there being did then and there in the perpetration of and attempt to perpetrate a burgulary, he, the said Loyd Carroll Grandsinger unlawfully, maliciously, forcibly, burglariously and feloniously did break and enter a store building located in the Village of Wewala, Trippe County, South Dakota, owned, used and occupied by Frank Cole as a general merchandise store and United States Post Office, with intent then and there and thereby the money and personal property of hime, the said Frank Cole and the money and property of the United States of America situate in the post office part of said building then and there being to feloniously and burglariously to steal take and carry away, and while engaged in the stealing, taking and carrying away of money and property as aforesaid in said perpetration of and attempt to perpetrate a [fol. 18] burglary in the store building of said Frank Cole as aforesaid, he, the said Loyd Carroll Grandsinger, then and there being in the County of Cherry, State of Nebraska, did unlawfully, and feloniously shoot Marvin Hansen with a pistol, and as a result thereof Marvin Hansen died on April 8, 1954; Defendant, Loyd Carroll Grandsinger thus committed murder in the first degree while perpetrating and attempting to perpetrate burglary, contrary to the form of the Statutes in such cases made and provided, and against the peace and dignity of the State of Nebraska.

/s/ WILLIAM B. QUIGLEY

Subscribed in my presence and sworn to before me this 12th day of April 1954.

C. H. Elliot
County Judge

(Seal)

[fol. 19] Exhibit "B".

Warrant for First Degree Murder.

State of Nebraska,
County of Cherry—ss.:

In County Court, of Cherry County
The State of Nebraska, Cherry County.

To the Sheriff or any Constable of Said County:

The State of Nebraska,
#7440. vs.
Loyd Carroll Grandsinger.

Whereas, there has been filed with the undersigned Magistrate, in writing, the complaint and information of William B. Quigley, County Attorney of Cherry County aforesaid, made in the name of the State of Nebraska, before me, the undersigned County Judge, within and for said County of Cherry, State of Nebraska, this 12th day of April, A. D., 1954, who being duly sworn, on oath says, that Loyd Carroll Grandsinger on or about the 8th day of April, A. D., 1954, in the County of Cherry and State of Nebraska, then and there being did then and there feloniously, purposely, and of his deliberate and premediated malice, shot Marvin Hansen with a pistol, and as a result of so being shot the said Marvin Hansen died on April 8, 1954; Defendant thus committed murder in the first degree.

Count Two.

William B. Quigley being further duly sworn, on oath says, that Loyd Carroll Grandsinger on or about the 8th day of April, A. D., 1954, in the County of Cherry and State of Nebraska, then and there being did then and there in the perpetration of and attempt to perpetrate a burgulary, he, the said Loyd Carroll Grandsinger unlawfully, maliciously, forcibly, burglariously and feloniously did break and enter a store building located in the Village of Wewela, Trippe County, South Dakota, owned, used and occupied by Frank Cole as a general merchandise store and United States Post Office, with intent then and there and thereby

the money and personal property of him, the said Frank Cole and the money and property of the United States of America situate in the post office part of said building then [fol. 20] and there being to feloniously and burglariously to steal take and carry away, and while engaged in the stealing, taking and carrying away of money and property as aforesaid in said perpetration of and attempt to perpetrate a burglary in the store building of said Frank Cole as aforesaid, he, the said Loyd Carrol Grandsinger, then and there being in the County of Cherry State of Nebraska, did unlawfully, and feloniously Shoot Marvin Hansen with a pistol, and as a result thereof Marvin Hansen died on April 8, 1954; Defendant, Loyd Carroll Grandsinger thus committed murder in the first degree while perpetrating and attempting to perpetrate burglary, contrary to the form of the Statutes in such cases made and provided, and against the peace and dignity of the State of Nebraska.

These are, therefore, to command you forthwith to take the said accused and bring his body before me, or some other magistrate having cognizance of the case, to be dealt with according to law.

Given under my hand and seal this 12th day of April 1954.

(Seal)

C. H. ELLIOTT,
County Judge.

[fol. 21] Exhibit "C".

Information—County Attorney.

Filed May 7, 1954. Signed Ben F. Wilkinson, Clerk of the District Court, By James Sheets, Deputy.

State of Nebraska,
County of Cherry—ss.:

In the District Court of the Sixteenth Judicial District of Nebraska, in and for Cherry County.

The State of Nebraska, Plaintiff,
vs.
Loyd Carroll Grandsinger, Defendant.

Be It Remembered, That William B. Quigley, County Attorney in and for Cherry County, and in the Sixteenth

Judicial District of the State of Nebraska, who prosecutes in the name and by authority of the State of Nebraska, comes here in person into Court at this, the December term, A. D., 1953, thereof, and for the State of Nebraska, gives the Court to understand and be informed that Loyd Carroll Grandsinger late of the county aforesaid, did, on the 8th day of April, A. D., 1954, in the County of Cherry and State of Nebraska aforesaid, then and there being did then and there feloniously, purposely, and of his deliberate and premeditated malice, shot Marvin Hansen with a pistol, and as a result of so being shot the said Marvin Hansen died on April 8, 1954; Defendant thus committed murder in the first degree.

Count Two.

William B. Quigley being further duly sworn, on oath says, that Loyd Carroll Grandsinger on or about the 8th day of April, A. D., 1954, in the County of Cherry and State of Nebraska, then and there being did then and there in the perpetration of and attempt to perpetrate a burgulary, he, the said Loyd Carroll Grandsinger unlawfully, Maliciously, forcibly, burglariously and feloniously did break and enter a store building located in the Village of Wewela, Trippe County, South Dakota, owned, used and occupied by Frank Cole as a general merchandise store and United States Post Office, with intent then and there and thereby the money and personal property of him, the said Frank Cole [fol. 22] and the money and property of the United States of America situate in the post office part of said building then and there being to feloniously and burglariously to steal take and carry away, and while engaged in the stealing, taking and carrying away of money and property as aforesaid in said perpetration of and attempt to perpetrate a burglary in the store building of said Frank Cole as aforesaid, he, the said Loyd Carroll Grandsinger, then and there being in the County of Cherry, State of Nebraska, did unlawfully, and feloniously shoot Marvin Hansen with a pistol, and as a result thereof Marvin Hansen died on April 8, 1954; Defendant, Loyd Carroll Grandsinger thus committed murder in the first degree while perpetrating and attempting to perpetrate burglary.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Nebraska.

/s/ WILLIAM B. QUIGLEY,
County Attorney.

Endorsed on Back as follows:

State of Nebraska,
County of Cherry—ss.:

William B. Quigley, Being first duly sworn, upon his oath says that he is the County Attorney in and for Cherry County, in the Sixteenth Judicial District of the State of Nebraska, and that the allegations and charges against the defendant, Loyd Carroll Grandsinger, in the within information are true as he verily believes.

/s/ WILLIAM B. QUIGLEY.

Subscribed in my presence, and sworn to before me, this 7 day of May, A. D., 1954.

(Seal) /s/ BEN F. WILKINSON,
Clerk of the District Court.

[fol. 23] Exhibit "D".

Motion to Quash Count Two of Information.

In the District Court of Cherry County, Nebraska.

The State of Nebraska, Plaintiff,
vs.
Loyd Carroll Grandsinger, Defendant.

Comes now the defendant by his attorneys Charles A. Fisher, and William C. Heelan, and moves the Court to quash Count Two of the information, because there is a defect apparent upon the face of the record in the form of the information and manner in which the offense is charged.

Because on the face of the information the supposed crime of burgulary or attempt to perpetrate a burgulary occurred in Trippe County, State of South Dakota, and

this Court has no jurisdiction of the supposed crime charged in Count Two of the information.

Because the venue of charged crime is outside of Cherry County and the State of Nebraska.

Dated this 1st day of June, 1954.

LOYD C. GRANDSINGER,
Defendant.

WILLIAM C. HEELAN, CHARLES, A. FISHER, Attorneys for Defendant.

(Filed in District Court of Cherry County, Nebraska, June 1, 1954)

[fol. 24] Exhibit "E".

Journal Entry of Trial in District Court of Cherry County, Nebraska.

In the District Court of Cherry County, Nebraska.

The State of Nebraska, Plaintiff,
vs.
Loyd Carroll Grandsinger, Defendant.

Now on this 1st day of June, 1954, being one of the days of the regular June term, 1954 of the District Court of Cherry County, Nebraska this cause came on to be heard upon the motion of the defendant to quash the second count of the information heretofore filed herein and is submitted to the court, upon consideration whereof the court sustains the motion and it is ordered that the second count of the information, charging the defendant with first degree murder committed in the perpetration of a burglary be and it is hereby quashed. Upon motion of William B. Quigley, County Attorney, it is ordered that Rush C. Clarke of North Platte, Nebraska, a member of the bar of the State of Nebraska, be and he is hereby appointed to assist the County Attorney in the prosecution of this action.

And now on the 2nd day of June, 1954, being one of the days of the same term, the defendant Loyd Carroll Grand-

singer being present in open court accompanied by his attorneys William C. Heelan and Charles Fisher, the defendant is brought to the bar of the court and the information heretofore filed against him is fully and distinctly read to the defendant, and the defendant being asked whether he is guilty or not guilty of the offense therein charged against him answered "Not Guilty," which plea is entered on the information.

[fol. 25] And the defendant still being present in open court accompanied by his counsel, and the state being present by William B. Quigley, County Attorney and Rush C. Clarke, the the parties and the court proceeded to examine and empanel a jury and continued until the hour of 5 o'clock p.m., when the entire jury panel, including the members already examined, were duly cautioned and admonished according to law and the court recessed until June 3, 1954 at 9 o'clock a.m.

And now on this 3rd day of June, 1954, being one of the days of the same term, came the parties and their attorneys as heretofore, and the defendant being present, the parties and the court continued the examination and empaneling of a jury until the hour of 1:30 p.m., at which time the jury panel having been exhausted, the members of the panel including the jurors already examined, were cautioned and admonished as required by law and the court recessed until June 4, 1954 at 9 o'clock a.m.

And now on the same day the court ordered and was present at the drawing of additional jurors who were ordered to report on June 4, 1954 at 9 o'clock a.m.

And now on this 4th day of June, 1954, it being one of the days of the same term, came the defendant as heretofore, accompanied by his attorneys, came also the attorneys for the state, and the examination and empaneling of the jury continued and the court and the parties continued the examination and empaneling of a jury, and completed the examination of the jurors, and a jury consisting of Raymond J. Lutter, Alfred L. Conner, Vernon Loudon, Dwayne

Andersen, Roy Smith, Leigh Dahlgren, Bernard Nollette, Raymond O. Andrews, Byron V. Skinner, Edgar O. Connery, Milferd Johnson and Dale Green, twelve good and lawful men having the qualifications of jurors, were duly examined, empaneled and sworn and Paul Monroe and Reynold Darnell, two good and lawful men having the qualifications of jurors, were duly examined, empaneled [fol. 26] and sworn as alternate jurors, and the trial proceeded and counsel for the state made the opening statement to the jury, and counsel for the defendant made the defendant's opening statement to the jury, and the state commenced the introduction of evidence and continued therewith until the hour of 5 o'clock p.m., at which time the jury was cautioned and admonished acoording to law and the court recessed until June 5, 1954 at 9 o'clock a.m.

And now on this 5th day of June, 1954, being one of the days of the same term, came the jury heretofore empaneled and sworn, and came the defendant and his attorneys as heretofore, and came the counsel for the state, and the trial proceeded and the state continued with the introduction of its evidence. At 1:30 p. m. the state asked and was granted leave to endorse the name of Thomas Combs upon the information as a witness for the state, and the name of such witness is endorsed upon the information in open court. The state continued the introduction of its evidence until the hour of 3:45 p. m., at which time the jury is cautioned and admonished as required by law and the court recessed until the 7th day of June, 1954 at 9:30 a.m.

And now on this 7th day of June, 1954, being one of the days of the same term, came the defendant and his attorneys and came the counsel for the state and came the jury heretofore empaneled and sworn and the state continued the introduction of its evidence until 5 o'clock p.m., at which time the jury was duly cautioned and admonished as required by law and the court recessed until the 8th day of June, 1954 at 9 o'clock a.m.

And now on this 8th day of June, 1954, the same being one of the days of the same term, came the defendant as heretofore accompanied by his counsel as heretofore, came the counsel for the state, and came the jury heretofore em-

paneled and sworn, and the jury was immediately cautioned and admonished as required by law and excused, on motion [fol. 27] of the defendant in order that a hearing might be had upon the question of the admissibility of certain statements of the defendant in the nature of admissions, outside the presence of the jury; and the jury having retired, the court continued in the absence of the jury and the state introduced its evidence as to the voluntary character of certain statements and admissions of the defendant, and as to the admissibility of such statements and admissions and rested, and the defendant introduced his evidence on that question until the hour of 5 o'clock p.m., at which hour the jury were again called to the court, and without hearing further evidence, were cautioned and admonished as required by law and the court recessed until June 9, 1954 at 9 o'clock a.m.

And now on this 9th day of June, 1954, being one of the days of the same term, came the defendant and his attorneys as heretofore and the attorneys for the state as heretofore, and the defendant continued the introduction of his evidence before the court, and without the presence of the jury, upon the question of the admissibility of the statements and admissions sought to be offered in evidence by the state, and rested, and the state introduced its evidence in rebuttal on that question and rested, and the court being fully advised in the premises and having heard the evidence and observed the conduct and demeanor of the witnesses while testifying, finds that the statements and admissions offered and attempted to be introduced by the state were voluntarily made by the defendant and were and are not inadmissible as a matter of law. It is therefore ordered that the jury be recalled and that the trial proceed, and that the state continue the introduction of its evidence, the question of the voluntary character of the statements and admissions of the defendant to be submitted to the jury as questions of fact. Accordingly, at the hour of 10:30 a.m., came the jury heretofore empaneled and sworn, and the defendant and his attorneys being still present and the counsel for the state being still present, the state continued the introduction of its evidence until the hour of 5 o'clock p.m., when

the jury were duly cautioned and admonished as required by law and the court recessed until June 10, 1954 at 9 o'clock a.m.

[fol. 28] And now on this 10th day of June, 1954, being one of the days of the same term, came the jury heretofore empaneled and sworn in this cause, and came the defendant and his counsel, and came the counsel for the state, and the trial continued, and the state continued the introduction of its evidence and rested, and the defendant commenced the introduction of his evidence and continued therewith until the hour of 5 o'clock p.m., when the court adjourned until June 11, 1954 at 9 o'clock a.m.

And now on this 11th day of June, 1954, being one of the days of the same term, came the jury heretofore empaneled and sworn, the defendant and his attorneys and the counsel for the state and the trial proceeded and the defendant introduced his evidence until the hour of 3:30 p.m., when the jury were duly cautioned and admonished as required by law and the court recessed until June 12, 1954 at 9 o'clock a.m.

And now on this 12th day of June, 1954, being one of the days of the same term, came the jury heretofore empaneled and sworn in this cause, and came the defendant and his attorneys heretofore and the counsel for the state as heretofore, and the trial proceeded and the defendant continued the introduction of his evidence until the hour of 2 o'clock p.m., at which time the jury were duly cautioned and admonished as heretofore and the court recessed until June 14, 1954 at 9 o'clock a.m.

And now on this 14th day of June, 1954, being one of the days of the same term, came the jury heretofore empaneled and sworn in this cause, as heretofore, and came the defendant and his counsel and the counsel for the state as heretofore and the trial continued, and the defendant continued with the introduction of his evidence until the hour of 2 o'clock p.m. and rested, and the state introduced its evidence in rebuttal and rested, and the defendant introduced his evidence in surrebutal and rested at the hour of 4

o'clock p.m., at which time the jury were duly cautioned and admonished according to law and the court recessed until June 15, 1954 at 9 o'clock a.m.

[fol. 29] And now on this 15th day of June, 1954, being one of the days of the same term, came the defendant and his attorneys, and came the counsel for the state, and came also the jury heretofore empaneled and sworn, and counsel for the state made their opening argument, counsel for the defendant made their argument and counsel for the state made their closing argument, and the jury having heard the evidence, the arguments of counsel and the instructions of the court retired in charge of a sworn bailiff at the hour of 5 o'clock p.m. to deliberate of their verdict, the alternate jurors being discharged after hearing the instructions of the court, and the court recessed until the jury should arrive at its verdict.

And now on this 16th day of June, 1954 at 8:45 a.m. the defendant being present accompanied by his counsel and counsel for the state being present, the jury heretofore empaneled and sworn in this cause returned into open court, still in charge of the sworn bailiff, and in open court returned the following verdict:

"We, the Jury duly impanelled and sworn in the above entitled cause do find the defendant guilty of murder in the first degree, and fix the penalty at death.

Dated this 16th day of June, 1954.

Raymond J. Lutter	Bernard Nollette
Alfred L. Conner	Raymond O. Andrews
Vernon Loudon	Byron V. Skinner
Dwayne Anderson	Edgar O. Connery
Roy Smith	Milferd Johnson
Leigh Dahlgren	Dale Green, Foreman."

which verdict is received, filed and read in open court. At the request of the defendant the several jurors were polled and each juror being asked individually whether the foregoing verdict was and is his verdict answered in the affirmative. Whereupon the jury is discharged and excused.

And now on the same day came the defendant and his attorneys and came the counsel for the state and the cause came on to be heard upon the motion of the defendant for a [fol. 30] new trial of this cause, and is submitted to the court, upon consideration whereof the court being fully advised in the premises overrules the motion for a new trial.

And now on the same day, the defendant still being present in court with his attorneys and counsel for the state being present, the cause came on for final judgment. The defendant was informed of the verdict of the jury, and being asked whether he had anything to say why sentence and judgment should not be pronounced against him answered nothing to stay the sentence of the court.

It Is Therefore Considered by the court that you the defendant, Loyd Carroll Grandsinger be taken hence by the sheriff of Cherry County, Nebraska to the State Penitentiary at or near Lincoln, Lancaster County, Nebraska and be there confined until the date fixed for your execution, and that upon the date so fixed for your execution you be executed and put to death in the manner prescribed by law. October 15, 1954 is hereby appointed as the day for your execution.

Upon application of the defendant for an order directing that a bill of exceptions and transcript of the proceedings herein be furnished at the cost of Cherry County, it is ordered that the application be sustained and that a bill of exceptions and transcript shall be prepared at the expense of Cherry County, Nebraska. And the defendant having given notice to the court of his intention to apply for a writ of error, it is ordered, upon application of the defendant, that the execution of the sentence and judgment against him be suspended for thirty days to give the defendant a reasonable time to apply for such writ.

By The Court:

E. L. MEYER,
Judge.

(Filed in District Court of Cherry County, Nebraska, July 14, 1954.)

[fol. 31] Exhibit "F"

Verdict of Jury.

In the District Court of Cherry County, Nebraska.

The State of Nebraska, Plaintiff,

vs.

Loyd Carroll Grandsinger, Defendant.

State of Nebraska,
County of Cherry—ss.:

We, the Jury duly impanelled and sworn in the above entitled cause do find the defendant guilty of murder in the first degree, and fix the penalty at death.

Dated this 16 day of June, 1954.

Raymond J. Lutter
Alfred L. Conner
Verdon Loudon
Dwayne Andersen
Roy Smith
Leigh Dahlgren
Bernard Nollette
Raymond O. Andrews
Byron V. Skinner
Edgar O. Connery
Milferd Johnson
Dale Green
Forman.

(Filed in District Court of Cherry County, June 16, 1954)

[fol. 32] Exhibit "G".

Commitment to Penitentiary.

State of Nebraska,
Cherry County—ss.:

The State of Nebraska, Cherry County.

To the Sheriff of said County:

Whereas; At a regular term of the District Court for said county, which term was begun and held at the Court

House, in Valentine, Nebraska, in said county, on the 1st day of June, 1954; Present, the Hon. E. L. Meyer one of the judges of said court;

And, whereas, William B. Quigley County Attorney in and for the County of Cherry, State of Nebraska, on the 7th day of May 1954, came into Court, and presented a certain information in due form of law, against Loyd Carroll Grandsinger for First Degree Murder which information was by order of the Court filed and the cause docketed; and afterwards on the 2nd day of June 1954, further proceedings were had upon said information, to wit:

On plea of Guilty.

The said defendant was duly arraigned and entered h.... plea of guilty to the charge contained in the information.

On Trial to Jury.

A jury was impaneled and sworn in due form, the said Loyd Carroll put on his trial, and the said jury returned a verdict of guilty of murder in the first degree, and fix the penalty at death.

And, whereas, on the 16th day of June, 1954, the said Loyd Carroll Grandsinger was du y arraigned before the Court for sentence, and was then by the said judge sentenced, in these words:

It is therefore considered by the court that you the defendant, Loyd Carroll Grandsinger be taken hence by the sheriff of Cherry County, Nebraska to the State Penitentiary at or near Lincoln, Lancaster County, Nebraska and be there confined until the date fixed for your execution, and that upon that date so fixed for your execution you be executed and put to death in the manner prescribed by law. October 15, 1954 is hereby appointed as the day for your execution.

[fol. 33] You are therefore commanded to proceed to execute the said sentence and order of the Court.

Witness, my hand and seal of said Court, at Valentine, Nebraska, this 14th day of July, 1954.

(Seal)

/s/ BEN F. Wilkinson
Clerk District Court

[fol. 34] Exhibit "H"

(Order suspending Execution of Sentence)

In the District Court of Cherry County, Nebraska,

State of Nebraska, Plaintiff,

vs.

Loyd Carroll Grandsinger, Defendant.

Upon the foregoing showing, the Court being fully advised in the premises, the Court Reporter Lowell Widler, is ordered and directed to prepare a bill of exceptions in this case, and deliver the same to Charles A. Fisher and W. C. Heelan, attorneys for Loyd Carroll Grandsinger and that the fees of the Court Reporter for the same be paid by the County of Cherry, Nebraska, upon his presentation of claim therefor.

It is further ordered that the Clerk of the District Court of Cherry County, Nebraska, forthwith prepare and deliver to said attorneys a duly and properly executed transcript of proceedings in this case, so that same may be filed in the Supreme Court of Nebraska. This transcript properly certified as provided by law to be prepared and delivered to said attorneys for Loyd Carroll Grandsinger within 30 day of June 16, 1954.

It is further ordered that notice of intention to apply for Writ of error having been given by the defendant Loyd Carroll Grandsinger, he having been convicted of murder in the first degree, that sentence be suspended for one month

to give the defendant an opportunity to apply for such writ of error.

By the Court:

E. L. MEYER
District Court

(Filed in District Court of Cherry County, Nebraska, June 16, 1954)

[fol. 35] Exhibit "I"

(Judgment in Supreme Court of Nebraska)

Supreme Court of Nebraska September Term, A.D., 1955

Friday, December 16, 1955.

By order of the Court, the following proceedings were had and done:

Dec. 16. Loyd Carroll Grandsinger, Plaintiff in error,

vs.

The State of Nebraska, Defendant in error.

Error to the District Court of Cherry County, No. 33663.

This cause coming on to be heard upon proceedings in error to the district court of Cherry county, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said district court. It is, therefore, considered, ordered and adjudged that said judgment of the district court be, and hereby is, affirmed and Friday, March 30, 1956, between the hours of 6:00 a.m. and 6:00 p.m. of said day is fixed as the date for carrying into effect the sentence of the district court; that Cherry county, in the name of the State of Nebraska, defendant in error, pay all costs incurred herein, taxed at $342.40; for all of which execution is hereby awarded, and that a mandate issue accordingly.

Opinion by Chappell, Judge.

/s/ ROBT. G. SIMMONS
Chief Justice

[fol. 36] Exhibit "J"

(Order denying Petition for Rehearing)

Supreme Court of Nebraska, January Term, A.D. 1956.

Feb. 11.

Loyd Carroll Grandsinger, Plaintiff in error,

vs.

State of Nebraska, Defendant in error.

Error to the District Court of Cherry County, No. 33663.

This cause coming on to be heard upon motion of plaintiff in error for a rehearing herein, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no probable error in the judgment of this court heretofore entered herein. It is, therefore, considered, ordered and adjudged that said motion for rehearing be, and hereby is, overruled and a rehearing herein is denied.

ROBERT G. SIMMONS
Chief Justice.

[fol. 37] Exhibit "K".

Mandate.

In the Supreme Court of the State of Nebraska.
Sitting at Lincoln January Term, 1956.

To The District Court Of The Sixteenth Judicial District, sitting in and for the County of Cherry—Greeting:

Whereas, in a late action before you, wherein The State of Nebraska was plaintiff—and Loyd Carroll Grandsinger was defendant—, a judgment was rendered by, upon a transcript of which record and proceedings in your said Court, the said defendant prosecuted error proceedings to

the Supreme Court of the State of Nebraska, upon a trial of which cause in said Supreme Court during the September Term, A. D., 1955, it was considered by said Court that the judgment rendered by you be affirmed at the costs of said County of Cherry in the name of the State of Nebraska taxed at $342.40.

Now, Therefore, You are commanded, without delay, to cause execution to issue carrying into effect your said judgment in the manner provided by law.

Witness, The Hon. Robert G. Simmons, Chief Justice, and the Seal of said Court, this 13th day of February, 1956.

(Seal) GEORGE H. TURNER,
Clerk.
By /s/ Gerald S. Vitamvas,
Deputy.

[fol. 38] Exhibit "L".

Death Warrant

In the Supreme Court of the State of Nebraska.

Sitting at Lincoln, January Term. A. D., 1956.

The State of Nebraska

To the Warden of the State Penitentiary of the State of Nebraska:

Whereas, In an action lately pending in the District Court of Cherry County, Nebraska, wherein the State of Nebraska was plaintiff and Loyd Carroll Grandsinger was defendant, the said defendant was found guilty of murder in the first degree and by judgment of the District Court of said county sentenced to be electrocuted by the Warden of the Nebraska State Penitentiary, by causing to pass through the body of said Loyd Carroll Grandsinger a current of electricity of sufficient intensity to cause death, and that

the application of such current be continued until the said defendant, Loyd Carroll Grandsinger, is dead; and

Whereas, the said defendant, Loyd Carroll Grandsinger, was by the sheriff of Cherry County delivered into your custody to be safely kept within the State Penitentiary until the time of the execution of said sentence, or until otherwise ordered by competent authority; and

Whereas, the said defendant, Loyd Carroll Grandsinger, procured a writ of error from the Supreme Court of the State of Nebraska and a suspension of the execution of said sentence until the said writ of error should be heard and determined; and

Whereas, upon a trial of said cause in said Supreme Court during the September Term, A. D., 1955, to-wit, December 16, 1955, said judgment of said District Court of Cherry County, was in all things affirmed, and Friday, March 30, 1956, between the hours of 6:00 a.m. and 6:00 p.m. of said day, fixed as the time for the execution of said sentence; and

Whereas, thereafter, to-wit, on the fifth day of January, 1956, said defendant, Loyd Carroll Grandsinger, filed a [fol. 39] motion for rehearing in said cause and briefs in support thereof, and on the eleventh day of February, 1956, the said Supreme Court after duly considering said motion for rehearing, entered an order and judgment overruling the same;

Now, Therefore, This is to command you to proceed to carry said sentence into execution within the walls of the Nebraska State Penitentiary, or within the yard or inclosure adjacent thereto, so as to exclude the view of all persons, save those permitted to be present as provided by law, and that on Friday March 30, 1956, between the hours of 6:00 a.m., and 6:00 p.m., you cause a current of electricity of sufficient intensity to cause death to pass through the body of defendant, Loyd Carroll Grandsinger, and that the application of such current of electricity be continued until the said defendant, Loyd Carroll Grandsinger, is dead.

Witness, The Honorable Robert G. Simmons, Chief Justice of the Supreme Court of the State of Nebraska, at the Capitol, in the City of Lincoln, and the Seal of said Supreme Court hereto attached by me, this thirteenth day of February, 1956.

(Seal)

/s/ GEO. H. TURNER,
Clerk of the Supreme Court of the State of Nebraska.

[fol. 40] Exhibit "M".

(Motion for Recall of Mandate filed in Supreme Court of Nebraska)

In the Supreme Court of Nebraska.

Loyd Carroll Grandsinger, Plaintiff in Error,
vs.
The State of Nebraska, Defendant in Error.

Comes now the plaintiff in error, Loyd Carroll Grandsinger, presently under the sentence of death which is to be executed March 30th, 1956, and respectfully moves the Court for a recall of the mandate entered on the judgments filed in this Court on dates of December 16, 1955 and February 11, 1956, the latter judgment denying plaintiff in error a rehearing in this Court, and for a stay of the execution of the judgment herein. As reasons for this motion, plaintiff in error represents to the Court:

1. Plaintiff in error desires to prosecute proceedings by certiorari to the Supreme Court of the United States, from the decision and judgment rendered in this case by this Honorable Court, in which proceedings plaintiff in error desires to raise, individually and severally, the following federal constitutional questions, to-wit:

a. Was plaintiff in error denied his constitutional right to a fair and impartial trial, by misconduct of the County Attorney of Cherry County, Nebraska, and the Special

Prosecutor for the State of Nebraska, during the course of his trial in Cherry County, Nebraska?

b. Was plaintiff in error denied his constitutional right to a fair and impartial trial by misconduct of the jury which tried his case in the District Court in Cherry County, Nebraska?

c. Was plaintiff in error denied his constitutional right to a fair and impartial trial, by misconduct of the witnesses for the State of Nebraska, during the course of his trial in Cherry County, Nebraska?

d. Was plaintiff in error denied his constitutional right to a fair and impartial trial by misconduct of the district [fol. 41] judge which tried his case in the District Court in Cherry County, Nebraska?

e. Was plaintiff in error denied his constitutional right to counsel at the preliminary hearing and prior thereto, in Cherry County, Nebraska, in violation of due process of law?

f. Was plaintiff in error compelled to give evidence against himself in violation of the constitutional privilege against self incrimination, or, was plaintiff in error denied his constitutional right to a fair and impartial trial, or, was plaintiff in error denied due process of law, by the admission, by the District Court of Cherry County, Nebraska, of evidence of purported confessions and statements of plaintiff in error which the record showed were extracted from the plaintiff in error by means of threats, physical and mental duress, physical and mental exhaustion, and physical and mental torture?

g. Was plaintiff in error denied his constitutional right to a fair and impartial trial by abuse of discretion by the District Court of Cherry County, Nebraska, in the reception of evidence introduced for the sole purpose of appealing to the passions and prejudices of the jury?

h. Was plaintiff in error denied his constitutional right to a fair and impartial trial, by the denial of the trial

court's motion for a new trial upon the basis of newly discovered evidence tending to show that a member of the jury which tried plaintiff in error was also a member of the posse which apprehended plaintiff in error, and other newly discovered evidence?

i. Was plaintiff in error denied his constitutional right to adequate representation by counsel through actions of his counsel prejudicial to his case?

2. Plaintiff in error now makes showing that no action has been taken upon the mandate by the District Court in Cherry County, Nebraska.

3. Plaintiff in error now represents to this Court that he has exercised due diligence in making this motion for [fol. 42] recall of mandate, and that the delay in filing this motion was not due to the neglect or omission of either plaintiff in error or his attorney Charles A. Fisher, but was due solely to the inability of plaintiff in error to earlier raise funds sufficient to pay the expenses incident to application for a writ of certiorari in the Supreme Court of the United States as before mentioned. Plaintiff in error further represents to the Court that the order of this Court denying rehearing was entered February 11, 1956, at which time plaintiff in error was not aware that this Court would not be hearing motions after March 10, 1956, and that the lack of such knowledge was not due to the neglect or omission of plaintiff in error or his attorney, Charles A. Fisher.

Wherefore, plaintiff in error moves this honorable Court to recall the mandate entered on the judgment of this Court in this case, and prays that the enforcement of such judgment may be stayed for a reasonable time to enable plaintiff in error to obtain a writ of certiorari from the Supreme Court of the United States, and a hearing thereon.

/s/ LOYD CARROLL GRANDSINGER,
Plaintiff in Error.

[fol. 43] Exhibit "N".

(Application for stay pending appeal to Supreme Court of the United States)

In the Supreme Court of Nebraska.

Loyd Carroll Grandsinger, Plaintiff in Error,
vs.
The State of Nebraska, Defendant in Error.

Comes now the plaintiff in error, and respectfully shows to the Court that he desires to prosecute proceedings by certiorari to the Supreme Court of the United States, from the decision and judgment rendered in this case by this honorable Court on the 11th day of February, 1956, which denied plaintiff in error a rehearing upon the judgment of this Court, filed December 16, 1955, which set the date of March 30, 1956, as the date for enforcement of capital punishment in this case, upon the federal constitutional questions set forth in a motion for recall of mandate, of even date herewith paragraph 1, a through i, which is hereby incorporated herein by reference.

Because of his poverty, which has been proved before this Court by affidavit of plaintiff in error filed July 15, 1954, plaintiff in error is unable to give a bond in any amount as a condition for the stay. Plaintiff in error now alleges that his financial condition has not improved since that time.

Plaintiff in error therefore prays that the enforcement of such judgment may be stayed for a reasonable time to enable plaintiff in error to obtain a writ of certiorari from the Supreme Court of the United States, and a hearing thereon.

/s/ LOYD CARROLL GRANDSINGER,
Plaintiff in Error.

[fol. 44] Exhibit "O".

(Order of Supreme Court of Nebraska sustaining Motion for recall of Mandate, March 17, 1956)

Supreme Court of Nebraska, January Term, A. D., 1956.

March 17.

Loyd Carroll Grandsinger, Plaintiff in error,
vs.
The State of Nebraska, Defendant in error.

Error to the District Court of Cherry County. No. 33663.

This cause coming on to be heard upon motion of plaintiff in error to recall the mandate heretofore issued herein, to-wit, on February 13, 1956, was submitted to the court; upon due consideration whereof, it is by the court ordered that said motion to recall mandate be, and hereby is, sustained and the mandate issued on February 13, 1956, is recalled and the Clerk of the district court of Cherry county is hereby directed to return said mandate to the Clerk of this court forthwith.

ROBERT G. SIMMONS,
Chief Justice.

[fol. 45] Exhibit "P".

(Order sustaining Motion to stay proceedings, March 17, 1956)

Supreme Court of Nebraska, January Term, A. D., 1956.

March 17.

Loyd Carroll Grandsinger, Plaintiff in error.
vs.
The State of Nebraska, Defendant in error.

Error to the District Court of Cherry County. No. 33663.

This cause coming on to be heard upon motion of plaintiff in error to stay proceedings herein pending appeal to the Supreme Court of the United States, was submitted to

the court; upon due consideration whereof, it is by the court ordered that said motion of plaintiff in error to stay proceedings be, and hereby is, sustained and proceedings herein are ordered stayed until May 18, 1956.

ROBERT G. SIMMONS,
Chief Justice.

[fol. 46] Exhibit "Q".

(Notice of Dismissal of Counsel of Record and Retention of new Counsel)

In the Supreme Court of the State of Nebraska.

Loyd Carroll Grandsinger, Plaintiff in error.
vs.
State of Nebraska, Defendant-in-Error.

Comes now, Loyd Carroll Grandsinger in propria persona, the plaintiff-in-error in the above-entitled cause, and represents and states to the Supreme Court of the State of Nebraska:

That on March 13, 1956 he dismissed Charles A. Fisher as Counsel and Attorney of record in the above-entitled cause, and

That on April 25, 1956 he retained Eugene D. O'Sullivan, Sr. of Omaha, Nebraska, a member of the Bar of the State of Nebraska, as his attorney of record in this cause.

Wherefore, Plaintiff-in-Error respectfully requests said Court to remove Charles A. Fisher as attorney of record in the above-entitled cause and substitute in place of said Charles A. Fisher, Eugene D. O'Sullivan, Sr., as attorney of record for plaintiff-in-error.

Dated this 27th day of April, 1956.

/s/ LOYD CARROLL GRANDSINGER.

[fol. 47] Exhibit "R".

(Appearance of Counsel for Plaintiff in Error)

In the Supreme Court of the State of Nebraska.

Loyd Carroll Grandsinger, Plaintiff-in-Error,
vs.
State of Nebraska, Defendant-in-Error.

Comes now Eugene D. O'Sullivan, Sr., of Omaha, Nebraska, a member of the Bar of the State of Nebraska, and respectfully represents to the Court that on April 25, 1956 he was retained as counsel by Loyd Carroll Grandsinger, plaintiff-in-error in the above-entitled action.

Wherefore, Eugene D. O'Sullivan, Sr., respectfully requests that his appearance as attorney of record be entered for Plaintiff-in-Error, Loyd Carroll Grandsinger in the afore-mentioned proceedings.

Dated this 28 day of April, 1956.

/s/ EUGENE D. O'SULLIVAN, SR.,
278 Aquila Court Bldg.,
Address

Omaha (2), Nebraska
City State

[fol. 48] Exhibit "S".

Motion for Leave of Court to File Amended and Supplemental Motion and Brief for Rehearing and Tender of Copy of Said Proffered Filings.

General Number 33663.

In the Supreme Court of Nebraska.

Loyd Carroll Grandsinger, Plaintiff in Error.
vs.
State of Nebraska, Defendant in Error.

Error from the District Court of Cherry County, Nebraska.

Hon. E. L. Meyer, District Judge.

Eugene D. O'Sullivan, Sr.,
Omaha, Nebraska.
Attorney for Plaintiff in Error.

Comes now the Plaintiff in Error, Loyd Carroll Grandsinger, acting by and through his attorney, Eugene D. O'Sullivan, Sr., and moves the Court for an order granting him, the said Loyd Carroll Grandsinger, leave of Court to file an Amended and Supplemental Motion for a Rehearing in this case and a Brief in support thereof, and states to the Court that 16 printed copies of same have been deposited in the Office of the Clerk of this Court and which copies are herewith tendered for filing in event that said leave of Court is granted.

1. That said Plaintiff in Error alleges that the questions to be presented herein could not have been raised in the Petition in Error or Motion for Rehearing heretofore filed in this case and passed upon adversely by the Court for the reason that they, and each of them relate to claimed misconduct and incompetence of Charles A. Fisher, then serving as chief defense counsel for Plaintiff in Error, and this Motion is the first opportunity accorded to plaintiff in error to present these questions to this Court by an attor-
[fol. 49] ney who was not culpable.

2. That the orderly administration of justice will be promoted and attained if the following constitutional questions presented herewith, and each of them, are considered by the Court and decided upon their merits at this time by this Court, and the necessity of future, prolonged collateral proceedings, in the State and Federal Courts, could be curtailed or avoided.

3. That said plaintiff in error further states to the Court that Charles A. Fisher, the former Chief Defense Attorney for said plaintiff in error in this case, because of reasons personal to himself growing out of his own misconduct and

incompetence during the trial of the case in the District Court and the Supreme Court, failed, neglected and refused to raise the following questions, and each of them, in the District Court and in the Supreme Court of Nebraska, or in any other legal proceedings had in said case, all of which matters now sought to be raised materially affect the substantial rights of said Plaintiff in Error:

(a) That the confessed criminal misconduct of Chief Defense Counsel, Charles A. Fisher, who was caught in the act of tampering with the evidence offered in the case and was forced to confess his guilt in open court in the presence of the jury, by admitting his own misconduct where the trial jury could not have any further trust or confidence in him, and created situations in which the interests of defense counsel, thereafter, in endeavoring to protect his own professional future were adverse to the duties which an attorney owes his client and such besmirchment of said attorney and his self-created conflict of interest was and is a deprivation of the effective and unqualified representation by counsel required in state capitol cases by the appropriate parts of Section 1 of the Fourteenth Amendment to the United States Constitution.

(b) That a defendant is denied a fair trial, where the record shows that defense counsel was incompetent and engaged in criminal misconduct during the trial of the case [fol. 50] by mutilating an exhibit in the case, and where the special prosecutor and the Court forced defense counsel in open court to confess his offense and admit his wrongful activity in front of the jury, and the Court failed to give the jury any cautionary instruction at any time concerning this matter.

(c) That the admission of confessions obtained from a defendant who, as a result of lack of food and sleep was physically and emotionally exhausted at the time of his arrest, who was frightened at the threat of mob violence, who was not given a preliminiary hearing promptly after his arrest, and who was allowed neither rest nor food nor permitted to converse with his friends or secure counsel until he had signed a confession, violated Section 1 of the

due process of law clause of the Fourteenth Amendment to the United States Constitution.

4. That in order to avoid needless repetition, quotations from the record in this case on file in this Court, and other essential and necessary data from the record as well, as the citation of supporting authorities which sustain the foregoing reasons are not set forth herein but, for the purpose of advising the Court are incorporated by reference herein from the supporting brief tendered for filing, as fully and completely as if set forth herein.

Wherefore, for each and all of the foregoing reasons the plaintiff in error respectfully prays for an order of Court granting him leave of Court to file his tendered Amended and Supplemental Motion and Brief for Rehearing in this case, and for such other and further relief as justice and equity may require.

LOYD CARROLL GRANDSINGER,

Plaintiff in Error.

By: /s/ Eugene D. O'Sullivan,
His Attorney.

[fol. 51] Exhibit "T."

(Order of Supreme Court of Nebraska granting leave to file Amended and Supplemental Motion and brief for rehearing)

Supreme Court of Nebraska, January Term, A.D. 1956.

June 13. Loyd Grandsinger, Plaintiff in error,
vs.
The State of Nebraska, Defendant in error.

Error to the District Court of Cherry County. No. 33663.

This cause coming on to be heard upon motion of plaintiff in error for leave to file an amended and supplemental motion for rehearing, was submitted to the court; upon

due consideration whereof, it is by the court ordered that said motion of plaintiff in error for leave to file an amended and supplemental motion for rehearing be, and hereby is, granted. It is further ordered that said second motion for rehearing shall be heard on Saturday, June 23, 1956.

ROBERT G. SIMMONS,

Chief Justice.

[fol. 52] Exhibit "U."

(Order of Supreme Court of Nebraska denying Petition for Rehearing, June 30, 1956)

Supreme Court of Nebraska, January Term, A.D. 1956.

June 30. Loyd Grandsinger, Plaintiff in error,

vs.

The State of Nebraska, Defendant in error.

Error to the District Court of Cherry County. No.33663.

This cause coming on to be heard upon amended and supplemental motion of plaintiff in error for a rehearing herein, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no probable error in the judgment of this court heretofore entered herein. It is, therefore, considered, ordered and adjudged that said motion for rehearing be, and hereby is, overruled and a rehearing herein is denied.

ROBERT G. SIMMONS,

Chief Justice.

[fol. 53] Exhibit "V."

(Order of Supreme Court of the United States staying execution of Sentence of Death)

Supreme Court of the United States.

No....., October Term, 1955.

Loyd Carroll Grandsinger, Petitioner,
vs.
State of Nebraska.

Upon consideration of the application of Counsel,

It is ordered that the execution of the sentence of death imposed upon the petitioner, Loyd Carroll Grandsinger, be, and the same hereby is stayed, pending the final disposition of a petition for writ of certiorari to review the judgment of the Supreme Court of Nebraska, provided the application is filed within the time required by law.

(SGD) TOM C. CLARK,
Associate Justice of the Supreme Court of the United States.

Dated this 3rd day of May, 1956.

A true copy.

Test:

(Seal) /s/ HAROLD B. WILLEY,
Clerk of the Supreme Court of the United States.

[fol.54] Exhibit "W."

(Order of Supreme Court U. S. denying Petition for Writ of Certiorari)

Supreme Court of the United States.

No. 112 Misc., October Term, 1956.

Loyd Carroll Grandsinger, Petitioner,
vs.
State of Nebraska.

On petition for writ of Certiorari to the Supreme..... Court of the State of Nebraska.

On consideration of the petition for a writ of certiorari herein to the Supreme.....Court of the State of Nebraska....., It is ordered by this Court that the said petition be, and the same is hereby, denied.

October 22, 1956.

A true copy.

Test:

(Seal) JOHN T. FEY,

Clerk of the Supreme Court of the United States.

By /s/ Hugh W. Barr, Deputy.

[fol. 55] Exhibit "X."

(Motion to stay execution of sentence on mandate, in Supreme Court of Nebraska.)

In The Supreme Court Of The State Of Nebraska

Loyd Carroll Grandsinger, Plaintiff in Error,
General No. 33663. vs.
State of Nebraska, Defendant in Error.

Comes now the plaintiff in error, Loyd Carroll Grandsinger, by Eugene D. O'Sullivan, his attorney of record in this Court, and shows to the Court that on October 22, 1956, the Supreme Court of the United States denied the Petition of the plaintiff in error for a Writ of Certiorari; that pursuant to the rules of the Supreme Court of the United States, its mandate will be returned to the Supreme Court of Nebraska with due dispatch; that according to the rules of the Supreme Court of the United States, the plaintiff in error, aforementioned, has twenty days, from October 22, 1956, in which to request a rehearing in said matter; and

that at the present time counsel for plaintiff in error has not determined whether or not to file a request for such rehearing and therefore petitions the Supreme Court of the State of Nebraska, for the foregoing reasons and each of them and other reasons not herein assigned, that after the return of the said mandate from the Supreme Court of the United States to the Supreme Court of Nebraska that execution of sentence pursuant to said mandate be stayed for a period of at least twenty days from October 22, 1956, or until the 14th day of November, 1956 or thereafter.

LOYD CARROLL GRANDSINGER,
Plaintiff in Error,

By /s/ Eugene D. O'Sullivan,
His attorney of Record.

[fol. 56] (Acknowledgment of service of copy of Motion to Stay execution of mandate.)

In The Supreme Court Of The State Of Nebraska

Loyd Carroll Grandsinger, Plaintiff in Error,
General No. 33663. vs.
State Of Nebraska, Defendant in Error.

Receipt of a copy of the Motion to Stay Execution of Sentence on mandate from the Supreme Court of the United States to the State of Nebraska is hereby acknowledged this 24th day of October, 1956.

THE STATE OF NEBRASKA,
By /s/ Clarence A. H. Meyer,
Deputy Attorney General of Nebraska.

[fol. 57] Exhibit "Y."

(Death Warrant of Supreme Court of Nebraska.)

In The Supreme Court Of The State Of Nebraska

Sitting at Lincoln, September Term, A. D. 1956.

The State of Nebraska

To the Warden of the State Penitentiary
of the State of Nebraska:

Whereas, In an action lately pending in the District Court of Cherry county, Nebraska, wherein the State of Nebraska was plaintiff and Loyd Carroll Grandsinger was defendant, the said defendant was found guilty of murder in the first degree and by judgment of the District court of said county sentenced to be electrocuted by the Warden of the Nebraska State Penitentiary, by causing to pass through the boyd of said Loyd Carroll Grandsinger a current of electricity of sufficient intensity to cause death, and that the application of such current be continued until the said defendant, Loyd Carroll Grandsinger, is dead; and

Whereas, the said defendant, Loyd Carroll Grandsinger, was by the sheriff of Cherry county delivered into your custody to be safely kept within the State Penitentiary until the time of the execution of said sentence, or until otherwise ordered by competent authority; and

Whereas, The said defendant, Loyd Carroll Grandsinger, procured a writ of error from the Supreme Court of the State of Nebraska and a suspension of the execution of said sentence until the said writ of error should be heard and determined; and

Whereas, Upon a trial of said cause in said Supreme Court during the September Term, A. D. 1955, to wit, December 16, 1955, said judgment of said District Court of Cherry county, was in all things affirmed, and Friday, March 30, 1956, between the hours of 6:00 a. m. and 6:00 p. m. of said day, fixed as the time for the execution of said sentence; and

Whereas, Thereafter, to wit, on the fifth day of January, 1956, said defendant, Loyd Carroll Grandsinger, filed a motion for rehearing in said cause and briefs in support [fol. 58] thereof, and on the eleventh day of February, 1956, the said Supreme Court after duly considering said motion for rehearing, entered an order and judgment overruling the same; and

Whereas, Thereafter said defendant, Loyd Carroll Grandsinger, filed a petition for writ of certiorari in the Supreme Court of the United States which petition was denied as shown by certified copy of an order of that court received and filed in the office of the Clerk of the Supreme Court of Nebraska on October 26, 1956.

Now, Therefore, This is to command you to proceed to carry said sentence into execution within the salls of the Nebraska State Penitentiary, or within the yard or inclosure adjacent thereto, so as to exclude the view of all persons, save those permitted to be present as provided by law, and that on Friday, December 28, 1956, between the hours of 6:00 a.m. and 6:00 p.m. you cause a current of electricity of sufficient intensity to cause death to pass through the body of defendant, Loyd Carroll Grandsinger, and that the application of such current of electricity be continued until the said defendant, Loyd Carroll Grandsinger, is dead.

Witness, The Honorable Robert C. Simmons, Chief Justice of the Supreme Court of the State of Nebraska, at the Capitol, in the City of Lincoln, and the Seal of said Supreme Court hereto attached by me, this twenty-ninth day of October, 1956.

(Seal)

/s/ GEO. H. TURNER,
Clerk of the Supreme Court
of the State of Nebraska.

[fol. 59] (Counter Showing of Petitioner to Return to Order to show cause.)

(Filed in U. S. District Court, Jan. 5, 1957.)

In The United States District Court
For The District Of Nebraska

Loyd Carroll Grandsinger, Petitioner,
No. 0265. vs. Civil.
Joseph B. Bovey, Warden, Nebraska State Penitentiary,
Respondent.

Petitioner accepts as true, though incomplete, the record of proceedings set forth in paragraphs numbered 1 to 23, inclusive, in respondent's Return To Order To Show Cause filed in these proceedings December 26, 1956; specifically denies respondent's conclusions set forth in paragraphs numbered 24, 25, 26 and 27 thereof; and makes the following showing to fully describe, explain and supplement the record of proceedings referred to in respondent's return and illustrate the inadequacies thereof to protect the constitutionally guaranteed rights of petitioner, and the flagrant violations thereof:

1. Petitioner was apprehended by members of a posse during the afternoon of April 9, 1954, and was retained in custody and confined to jail many days prior to the filing of the complaint and the so-called "preliminary hearing" described in paragraphs numbered 1 and 2 of the respondent's return, and was during said period of time physically abused, threatened and placed in fear of his life by officials of the County and State and held in jail without being permitted to contact or confer with counsel, relatives or friends, and constantly during said period of time subjected to grueling interrogation and efforts by officials of the County and State to force from petitioner a confession of the crime with which he was subsequently charged, and was not afforded an early preliminary hearing as required by law.

[fol. 60] 2. At the time of the incidents outlined in paragraphs numbered 1 and 2 of the respondent's return petitioner was taken from the jail by an official of the County to the County Court of Cherry County, Nebraska, without explanation of the proceedings to be therein conducted and without benefit of assistance of counsel, at which time charges against the petitioner were read, charging him with the offense of murder in the first degree in technical language not understandable to petitioner, to which charges, at the suggestion of the County Attorney, petitioner pleaded not guilty, and that though the record of the proceedings may show a waiver by petitioner of a preliminary hearing petitioner was not advised and did not

know of his right thereto, did not knowingly waive his right thereto nor understand that any such right existed, and was, under such circumstances, deprived of all rights to such hearing.

3. During the trial of petitioner in the District Court of Cherry County, Nebraska, and immediately prior to the arguments of counsel to the jury at the conclusion of the taking of evidence, Mr. Charles A. Fisher, chief defense counsel for petitioner, committed the acts of misconduct set forth in petitioner's application for a writ of habeas corpus in this proceeding, and following the argument of counsel the case was submitted to the jury, which returned the verdict set forth as Exhibit "F" to respondent's return at 8:45 A.M., June 16, 1954; that on the same day, to-wit, June 16, 1954, after the jury had returned a verdict against petitioner of guilty of murder in the first degree and directed a sentence of death, Mr. Charles A. Fisher, chief defense counsel for petitioner, prepared a written motion for a new trial, which said motion was on said same day, to-wit, June 16, 1954, filed with the clerk and by the trial judge overruled, and on said same day, to-wit, June 16, 1954, the said trial court pronounced sentence and fixed the day of execution of petitioner; that said motion for a new trial did not assign as a ground therefor the [fol. 61] misconduct of Charles A. Fisher, set forth in petitioner's application for a writ of habeas corpus in this proceeding, and did not raise the constitutional questions relating to the deprival of petitioner of complete assistance of counsel resulting from such misconduct, nor the denial to petitioner of due process of law, resulting from the admission in evidence of certain admissions or so-called "confessions" that had been secured from petitioner as a result of physical violence, threats, fear and long and relentless interrogations. In fact the motion for a new trial was hastily prepared and filed with the trial court for a ruling as a result of a prearrangement between counsel for petitioner and the special prosecutor for the State, whereby for the convenience of counsel who resided some distance from the place of trial and for the purpose of saving the County of Cherry and the State of Nebraska additional

expenses, but in complete disregard of petitioner's rights and best interests, the said motion for a new trial was to be prepared, filed and overruled and the petitioner sentenced on the same day said verdict was returned, as shown in "Supplemental Showing In Support Of Motion For Extension Of Time Of Time To Prepare Bill Of Exceptions", prepared and subscribed and sworn to by the said Charles A. Fisher, petitioner's counsel, and filed with the Supreme Court of the State of Nebraska November 4, 1954, copy of which said showing is attached hereto, marked Exhibit "A", and made a part hereof; that the conduct of the said Charles A. Fisher in cooperating with the special prosecutor for the State to obtain a summary dismissal of the petitioner's motion for a new trial immediately following the return by the jury of a verdict against the defendant of murder in the first degree and directing a sentence of death, deprived petitioner of a fair and impartial consideration of any proper motion for a new trial and the protection of his constitutional rights had the same been studiously prepared and properly presented to the trial court and considered and disposed of in an orderly [fol. 62] fashion; and such conduct unequivocally establishes the conflicting interests of petitioner and his said counsel, which conflict of interest was resolved by counsel in counsel's own favor.

4. The petitioner in error referred to in paragraph numbered 9 of respondents return, prepared by Charles A. Fisher, as attorney for petitioner, did not raise the constitutional questions of the deprivation of counsel resulting from counsel's misconduct and conflicting interests as demonstrated in the record, nor the denial to petitioner of due process of law, resulting from the use of coerced written admissions or confessions of petitioner; and due to the death of William C. Heelan, co-counsel for petitioner, shortly after the trial in the District Court of Cherry County, Nebraska, and before petitioner's appeal was presented to the Supreme Court of the State of Nebraska, petitioner was deprived of the assistance of all counsel with the exception of Charles A. Fisher, sole remaining counsel, the latter being, as shown by petitioner, disqualified to further act on his behalf and in his best interests.

5. Because of the failure of Charles A. Fisher to raise the constitutional questions presented in the petition for writ of habeas corpus in this proceeding in the proceedings before the Supreme Court of the State of Nebraska, the decision of the Supreme Court of the State of Nebraska, referred to in paragraph numbered 10 of respondent's return, and the opinion of the court therein, did not discuss nor dispose of such questions, nor were such questions raised by the said Charles A. Fisher in the original motion for rehearing filed with the Supreme Court of the State of Nebraska, referred to in paragraph numbered 11 of respondent's return, nor disposed of by the Supreme Court of the State of Nebraska in overruling said motion.

6. Petitioner's motion filed with the Supreme Court of the State of Nebraska for recall of the mandate, referred [fol. 63] to in paragraph numbered 13 of respondent's return and set forth as Exhibit "N" thereto, was not prepared by Charles A. Fisher, as is shown by affidavit of William H. Sherwood, an attorney of the Bar of the State of Nebraska, attached hereto, marked Exhibit "B", and made a part hereof.

7. The motion for leave of court to file amended and supplemental motion and brief for a rehearing, filed with the Supreme Court of the State of Nebraska June 12, 1956 by Eugene D. O'Sullivan, Sr., as sole counsel of record for petitioner, raised for the first time the constitutional questions and issues presented in petitioner's application for a writ of habeas corpus in this proceeding, copy of said motion being attached to respondent's return as Exhibit "S". Copy of the order of the Supreme Court granting said motion and thus permitting the injection into the record in the State court proceedings of the Federal constitutional questions set forth in said motion appears as Exhibit "T" to respondent's return. An amended and supplemental motion for a rehearing and brief in support of same was filed with the Clerk of the Supreme Court of the State of Nebraska June 18, 1956, copy of which is attached hereto, marked Exhibit "C", and made a part hereof. This motion was overruled without opinion and the Federal constitutional questions therein raised were

decided by the Nebraska Supreme Court against this petitioner.

8. The constitutional questions raised in petitioner's application for a writ of habeas corpus in this proceeding were fully presented to the Supreme Court of the United States in petitioner's application for a writ of certiorari to the Supreme Court of the State of Nebraska, filed with the Supreme Court of the United States within the time allowed therefor, copy of said petition for writ of certiorari being attached hereto, marked Exhibit "D", and made a part hereof; and upon the denial thereof by the United States Supreme Court, petitioner's remedies in the State courts were exhausted.

[fol. 64] Wherefore, petitioner respectfully prays the court to direct the issuance of a writ of habeas corpus pursuant to petitioner's application therefor.

LOYD CARROLL GRANDSINGER,
Petitioner.

By.....
His Attorneys.

State of Nebraska,
Lancaster County—ss.:

Loyd Carroll Grandsinger, being first duly sworn, on oath deposes and says that he is the petitioner in the above entitled matter; that he has read the above and foregoing counter showing of petitioner to respondent's return to order to show cause, and that the facts and statements therein contained are true as he verily believes.

.....

Subscribed in my presence and sworn to before me this 4th day of January, 1957.

.....
Notary Public.

Acknowledgment of Service.

Service of the above Counter Showing of Petitioner to Respondent's Return to Order to Show Cause and receipt of a copy thereof acknowledged this.....day of January, 1957.

.....
Attorney for Respondent.

[fol. 65] Exhibit "A".

(Supplemental Showing in support of Motion for extension of time to prepare Bill of Exceptions in Supreme Court of Nebraska)

In the Supreme Court of Nebraska.

Loyd Carroil Grandsinger, Plaintiff in error,
vs.
The State of Nebraska, Defendant in error.

State of Nebraska,
Dawes County,—ss.:

Charles A. Fisher, attorney for plaintiff in error, being on oath first duly sworn, deposes and says: That the special attorney for the State in the trial of this case in the District Court, stated that in event the Court reporter needed additional time in which to prepare the Bill of Exceptions that he Rush Clarke the Special Prosecutor would agree that this should be granted and that the Attorney General's Office would go along in the matter. That this agreement as to possible extension of time was made because of the fact that plaintiff in error, then defendant in the District agreed to the ruling on motion for new trial on the 16th of June, 1954 the day of the filing of the motion and day verdict was returned by the Jury. That it was then known by the Special Prosecutor, the County Attorney, the attorney for defendant (now plaintiff in error) the District Judge and the Court Reporter, that the Court

Reporter would not be able to get the Bill of Exceptions out timely, if motion for new trial was ruled on, on the 16th of June, 1954. That because of the agreement of the parties the Court did rule on it on June 16th, 1954, but only on the understanding that the Court Reporter would have all the time necessary to prepare the Bill of Exceptions: That the following is a copy of the letter written by Hon. Rush C. Clarke, the Special Prosecutor to the Attorney General Hon. C. S. Beck, and copies of which were sent to Hon. E. L. Meyer, District Judge, Hon. W. B. Quigley, County Attorney, Cherry County, Valentine, Nebraska, and Charles A. Fisher, attorney, Chadron, Nebraska, to-wit:

"

July 25, 1954

Hon. C. S. Beck,
Attorney General
Capitol Building,
Lincoln 9, Nebraska

[Vol. 66] Re: Grandsinger vs. State.

Dear Kent:

In connection with this case, which is a murder case from Cherry County, I wish to call your attention to the following:

The jury brought in a verdict of guilty and Mr. Fisher filed a motion for new trial. He did not feel it was worth while to argue the motion for new trial since everything had been pretty well argued out during the course of the trial. There was talk however of letting the matter or ruling on the motion for new trial go over for several weeks. I learned that the only reason for this was that the court reporter was going to need more time than he would otherwise get in which to prepare the Bill of Exceptions, since the court reporter is snowed under with work.

Since this was the only reason for a suggested delay, I, in order to avoid the necessity of having to come back to Valentine and avoiding the expense and trouble to the Judge and to Mr. Fisher and everybody else, volunteered

t e suggestion that I would almost be willing to guarantee that under the circumstances the Attorney General would make whatever stipulations might be necessary in the Supreme Court to extend the time for settling the Bill of Exceptions. Accordingly, on that assurance, Mr. Fisher agreed that the motion for new trial might be submitted to the court on that same day. This was done and the man was sentenced and the case was closed as far as the District Court is concerned.

I am sure that Judge Meyer would have held up the matter of disposing of the motion for new trial had it not been for my unauthorized action in making promises on your behalf.

This is all hearsay with me but I understand the law is now that after a certain length of time only the Supreme Court can grant an extension of time for settling the Bill of Exceptions. Undoubtedly it will be necessary for Mr. Fisher to make an application of such an extension. If he desires that I do so I will of course make an affidavit as to the foregoing matters.

I sincerely hope that you will have no objection to going along with Mr. Fisher when and if he makes an application for extension of time. In the long run no time will be lost and considerable expense to both the state and Cherry County will have been avoided.

Thanking you, I am

Respectfully yours,

2/b RUSH C. CLARKE.

cc—Hon. E. L. Meyer,
District Judge
Alliance, Nebraska
cc—Mr. Charles Fisher, Attorney
Chadron, Nebraska
cc—Hon. W. B. Quigley
County Attorney
Valentine, Nebraska

Trans: 7/26/54 "

That attorney for the plaintiff in error, would not have consented to, nor have filed the motion for new trial on the

16th of June, 1954, if it had not been understood by him, [fol. 67] and agreed to by the County Attorney of Cherry County, Nebraska, W. B. Quigley, the Special Prosecutor for the State of Nebraska, Rush C. Clarke, which agreement was approved by the Hon. E. L. Meyer, District Judge, that the overruling of the motion for new trial, would not deprive the Court Reporter of all the time he needed to prepare the Bill of Exceptions in this matter. That attorney for plaintiff in error did file the motion for new trial on the 16th of June, 1954, and permit a ruling on the same on that date only because it was understood and agreed that this would not speed the matter up or make it so that the Court Reporter Could not get out the Bill of Exceptions, and it would now be depriving the plaintiff in error of a substantial right and deprive him of his right to a full review it time is not granted in which to prepare and settle the Bill of Exceptions in this matter. That attorney for the plaintiff in error, has been diligent and it is through no fault of plaintiff in error, or his attorney that the Bill of Exceptions has not been prepared herein.

Wherefore, plaintiff in error again prays for additional time in which to prepare and settle the Bill of Exceptions herein.

Dated at Chadron, Nebraska, this 2nd of November, 1954.

LOYD CARROLL GRANDSINGER,
Plaintiff in Error.
By Charles A. Fisher, His Attorney.

Subscribed in my presence and sworn to before me this 2nd of November, 1954, by Charles A. Fisher.

(Seal) TOMMY LECHER,
Notary Public.

My commission expires April 30, 1958.

[fol. 68] Exhibit "B".

(Affidavit of William H. Sherwood)

State of Nebraska,
Furnas County—ss.:

I, William H. Sherwood, being first duly sworn, upon oath depose and say:

1. Charles A. Fisher, Attorney, Chadron, Nebraska, did not draft a document entitled "Motion for Recall of Mandate" filed in the case of Loyd Carroll Grandsinger vs. the State of Nebraska, in the Supreme Court of the State of Nebraska on date of March 9th, 1956.

2. Charles A. Fisher did not read the said motion prior to the filing of the same, nor was he aware until after the motion was filed of the nature of the constitutional issues raised therein.

3. Charles A. Fisher did not obtain the signature of Loyd Grandsinger on said motion, nor did he file the same.

4. The said motion was drafted by myself and Donald E. Rohde at the request of William D. Blue, the director of the Legal Aid Department of the University of Nebraska, College of Law, at that time, that Mr. Blue was then acting as legal assistant to Charles A. Fisher in the matter, as were Rohde and myself, that Mr. Rohde and myself obtained the signature of Loyd Grandsinger upon the said motion, and at the understanding and request of Mr. Fisher and Mr. Blue, filed the same with the Clerk of the Supreme Court of Nebraska on March 9th, 1956, at which time Mr. Rohde and myself obtained a stipulation from the Attorney General's office that Rule 11b of the Rules of the Nebraska Supreme Court might be waived.

5. That Mr. Fisher understood that it was necessary for us to raise constitutional issues in the Motion for Recall of Mandate, and that he requested us to file the same, but that the same were raised without his personal knowledge of the issues which were presented in said Motion. The contents of the motion were unknown to Mr. Fisher until the evening of the 9th day of March, 1956.

Further affiant saith not.

WILLIAM H. SHERWOOD.

Subscribed in my presence and sworn to before me this 26th day of December, 1956.

(Seal)

J. H. SHERWOOD,
Notary Public.

[fol. 70] Exhibit "C."

General Number 33663

In The
Supreme Court of Nebraska

Loyd Carroll Grandsinger,
Plaintiff in Error,
vs.
The State of Nebraska, Defendant in Error.

Error From The District Court of Cherry County, Nebraska

Hon. E. L. Meyer, District Judge.

Amended And Supplemental Motion For Rehearing And Brief In Support Of Same

EUGENE D. O'SULLIVAN, SR.,
Omaha, Nebraska,
Attorney for Plaintiff in Error.

Comes now the plaintiff in error, Loyd Carroll Grandsinger, acting by and through his attorney, Eugene D. [fol. 71] O'Sullivan, Sr., and moves the Court for an order granting him a rehearing in this case for the reason that Charles A. Fisher, the former attorney for plaintiff in error in this case, because of reasons personal to himself, growing out of his own misconduct and incompetence during the trial of the case in the District Court and the Supreme Court, failed, neglected and refused to raise the following questions, and each of them, in the District Court

and in the Supreme Court of Nebraska, or in any proceedings had therein, all of which affected materially the substantial rights of said plaintiff in error:

1. The confessed criminal and wrongful misconduct of chief defense counsel, Charles A. Fisher, who was caught by the trial judge and the special prosecutor enlarging with a dowel pin the bullet hole in the leather belt of Hansen, the deceased highway patrolman, and was brought before the Court and Jury and catechized about same and admitted doing said act, and then was permitted to continue conducting the defense of plaintiff in error without any precautionary instructions being requested or given by the Court at the time in question or at any time thereafter, created a situation in which the interests of chief defense counsel, Charles A. Fisher, thereafter in protecting his own professional future were adverse to the duties he owed his client, and such conflict of interest was and is a deprivation of the effective and unqualified representation of counsel required in state capital cases by Section 1 of the Fourteenth Amendment to the United States Constitution relating to due process of law.

[fol. 72] 2. A defendant is denied due process of law and a fair trial as guaranteed by Section 1 of the Fourteenth Amendment to the United States Constitution where the record shows that defense counsel was incompetent and engaged in criminal misconduct in mutilating an exhibit in the case, and where the special prosecutor and the trial court forced said chief defense counsel to admit his wrongful activity and confess his offense in the presence of the jury and where the Court failed to give, and defense counsel failed to request, any cautionary instruction at any time in reference to same.

3. The admission and use at the trial of confessions obtained from a defendant who as a result of lack of sleep and food was physically and emotionally exhausted at the time of his arrest, who was frightened at the threat of mob violence, who was not given a preliminary hearing promptly after his arrest, and who was allowed neither rest nor

food nor permitted to converse with his friends or secure counsel until he had signed a confession, was and is a denial of due process of law as guaranteed to him by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

In order to avoid needless repetition, quotations from the record in this case, and other essential and necessary data from the record as well as the citation of supporting authorities which sustain the foregoing reasons are not set forth herein, but are incorporated by reference from the supporting brief attached hereto as fully and completely as if set forth herein.

Wherefore, the plaintiff in error for each and all of the [fol. 73] three reasons hereinbefore set forth prays the Court for an order granting him a rehearing.

LOYD CARROLL GRANDSINGER,
Plaintiff in Error,
By Eugene D. O'Sullivan, Sr.,
His Attorney.

[fol. 74] Brief In Support Of Amended And Supplemental Motion For A Rehearing.

[fol. 75] Index.

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[fol. 78] Brief In Support Of Amended And Supplemental Motion For Rehearing.

1. The questions presented herewith could not have been raised in the petition in error or motion for rehearing heretofore decided by the Court for the reason that they and each of them arise out of claimed misconduct and incompetence of Charles A. Fisher, then serving as chief counsel for plaintiff in error, and this Motion is the first opportunity accorded to plaintiff in error to present these questions to this Court.

2. The orderly administration of justice will be promoted and attained if the serious constitutional questions presented herewith are decided on their merits at this time by this Court, thereby avoiding the necessity of future prolonged collateral proceedings in the state and federal courts.

3. Due to the confessed criminal misconduct of Charles A. Fisher, his then chief counsel, plaintiff in error was denied effective representation of counsel which was and is in violation of his rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States, relating to deprivation "of life, liberty * * * without due process of law * * *."

4. The plaintiff in error was denied due process of law as guaranteed to him by said Section 1 of the Fourteenth Amendment of the Constitution of the United States in that the misconduct of defense counsel, the misconduct of the special prosecutor in forcing defense counsel to confess to

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[fol. 79] a possible criminal act before the jury, the failure of the trial court to protect the rights of the plaintiff in error, and the permeating incompetence of defense counsel, each and all of which denied plaintiff a fair trial as contemplated by the Constitution of the United States as heretofore referred to.

5. The alleged confessions of the plaintiff in error were obtained in violation of the due process of law clause aforementioned and their admission in evidence was and is in violation of the said due process clause of the Fourteenth Amendment of the United States Constitution aforementioned.

Statement Of Questions Involved.

1. Does this Court have power to permit the filing of an amended and supplemental motion for rehearing made out of time, and if so, should it exercise that power in this case to review the following three errors?

2. Did the confessed criminal and wrongful misconduct of defense counsel in tampering with the evidence and rendering it valueless create a conflict of interest between defense counsel and his client which denied plaintiff in error effective and unqualified representation by counsel?

3. Did the claimed incompetence, fraud and misconduct of defense counsel, in a trial where the evidence was close, where defense counsel's misconduct was exploited by the special prosecutor to plaintiff in error's substantial prejudice, and where the trial court failed to protect the fundamental rights of the plaintiff in error, create an exceptional

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[fol. 80] situation which deprived the plaintiff in error of a fair trial under the Fourteenth Amendment of the United States Constitution as heretofore claimed?

4. Were the confessions, which were admitted in evidence by the trial court, obtained under such circumstances that their use by the State was contrary to the rights guaranteed to plaintiff in error by the Fourteenth Amendment of the United Sates Constitution heretofore referred to?

Propositions Of Law

I.

The Court has the power to grant a second motion for rehearing filed out of time where the questions presented, al-

though based upon the record, could not have been raised in the petition in error or the first motion for rehearing.

Nebraska Supreme Court Rule 19 (1956);

Strawn, Practice in the Supreme Court of Nebraska 348 (1900);

First National Bank v. Yokum, 12 Neb. 208, 10 N. W. 706 (1881);

First National Bank of Omaha v. Goodman, 55 Neb. 409, 75 N. W. 846 (1898);

Orfield, Criminal Appeals in America 97 (1939);

Schlencker v. State, 9 Neb. 300, 2 N. W. 710 (1879);

Thompson v. The People, 4 Neb. 524 (1876);

Nebraska Supreme Court Rule 8(a) (4) (1956).

II.

Confessed criminal misconduct of chief defense counsel,

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[fol. 81] Charles A. Fisher, who was caught in the act of tampering with the evidence and was forced to confess in open court by admitting his own misconduct before the jury, created a situation in which the interests of defense counsel, thereafter, in protecting his own professional future were adverse to the duties he owed his client. Such conflict of interest was and is a deprivation of the effective and unqualified representation by counsel required in state capital cases by the Fourteenth Amendment of the United States Constitution heretofore referred to.

Powell v. Alabama, 287 U. S. 45 (1932);

Glasser v. United States, 315 U. S. 60 (1942);

Craig v. United States, 217 F. 2d 355 (6th Cir., 1954);

Scott v. District of Columbia, 99 A. 2d 641 (Mun. Ct. App., D. C., 1953);

Wright v. Johnston, 77 F. Supp. 687 (N. D. Cal. 1948);

Hayman v. United States, 187 F. 2d 456 (9th Cir., 1951);

Canons of Professional Ethics Nos. 5, 15, 22, 32;

Neb. R. R. S. 1943, § 25-2121;

Neb. R. R. S. 1943, Sec. 28-737;

McCauley v. State, 124 Neb. 102, 245 N. W. 269 (1932.)

III.

A defendant is denied a fair trial, where the record shows that defense counsel was incompetent and engaged in criminal misconduct in mutilating an exhibit in the case, and where the special prosecutor and the court forced defense

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[fol. 82] counsel in open court to confess his offense and admit his wrongful activity in front of the jury, and the court failed to give the jury any cautionary instruction at any time.

Glasser v. United States, 315 U. S. 60 (1942);

Jones v. Huff, 152 F. 2d 14 (D. C. Cir., 1945);

Wilcoxen v. Aldredge, 192 Ga. 634, 15 S. E. 2d 873 (1941);

Wilson v. State, 51 N. E. 2d 848 (Ind. 1943).

IV.

The admission of confessions obtained from a defendant who as a result of lack of food and sleep was physically and emotionally exhausted at the time of his arrest, who was frightened at the threat of mob violence, who was not given a preliminary hearing promptly after his arrest, and who was allowed neither rest nor food nor permitted to

converse with his friends or secure counsel until he had signed a confession violated due process of law as required by the Fourteenth Amendment of the United States Constitution as heretofore quoted.

Leyra v. Denno, 347 U. S. 556 (1954),

Stein v. New York, 346 U. S. 156 (1953);

Brown v. Mississippi, 297 U. S. 278 (1936);

Chambers v. Florida, 309 U. S. 227 (1940);

Lisenba v. California, 314 U. S. 219 (1941);

Malinski v. New York, 324 U. S. 401 (1945);

Haley v. Ohio, 332 U. S. 596 (1948);

White v. Texas, 309 U. S. 530 (1940);

Ward v. Texas, 316 U. S. 547 (1942);

Ashcraft v. Tennessee, 322 U. S. 143 (1944);

Harris v. South Carolina, 338 U. S. 68 (1949);

Watts v. Indiana, 338 U. S. 49 (1949);

Turner v. Pennsylvania, 338 U. S. 62 (1949);

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[fol. 83] Neb. R. R. S. 1943, Sec. 29-401.

Neb. R. R. S. 1943, Sec. 29-406.

Argument.

Proposition I.

The Court has the power to grant a second motion for rehearing filed out of time where the questions presented, although based upon the record, could not have been raised in the petition in error or the first motion for rehearing.

Rule 19 of this Court provides that motions for rehearing "may be filed at any time within twenty days from the fil-

ing of the opinion or rendition of judgment in the case." (Emphasis added.) This time limitation is not imposed by statute but instead "is entirely by the grace of the court * * *. Being a matter of favor, the court may vary the time of its enjoyment to meet any case of accident or hardship." Strawn, Practice in the Supreme Court of Nebraska 348 (1900). An application to file a motion for rehearing out of time was made in First National Bank v. Yokum, 12 Neb. 208, 10 N. W. 706 (1881), and although it was denied for defects in the supporting affidavit, the Court indicated that such a motion would be permitted where the applicant through no fault of his own was unable to proceed earlier. In First National Bank of Omaha v. Goodman, 55 Neb. 409, 75 N. W. 846 (1898), the opinion was filed June 9, 1898, and the Court granted a motion for a second rehearing which was not requested until after December 22, 1898, or more than 202 days after the filing of the opinion in the case. 58 Neb. 701 (1899). The applicable Supreme Court Rule at that time was identical to present Rule 19, except

[fol. 84] that the time limitation was forty instead of twenty days. See Rule 7, Supreme Court Rules promulgated February 17, 1898, 52 Neb. ix, xii (1898).

The present case presents precisely the kind of exceptional situation in which, because "the court is desirous of avoiding errors," First National Bank v. Yokum, supra, a motion for rehearing out of time should be permitted. Defense counsel whose confessed criminal misconduct and easily discernible incompetence is the basis of the questions presented hereinafter in this brief, continued to purport to represent plaintiff in error on the petition in error and the first motion for rehearing. It is obvious that a person in his position would not be able to advance his own confessed criminal conduct as grounds for reversal. Present counsel consented to represent plaintiff in error on April 25, 1956, and only on that date did he begin a study of the nine volumes of testimony and numerous other exhibits and documents. The present Motion is being made at the earliest time at which it is possible to raise the serious constitutional questions to be discussed hereafter.

The Supreme Court of Nebraska has not lost jurisdiction of this case. On March 17, 1956 this Court recalled its mandate from the lower court and the mandate today rests within the possession of this Court. Thus the case is still before the Nebraska Supreme Court and the Court has jurisdiction over its final disposition.

On April 30, 1956, plaintiff in error applied to the Honorable Tom Clark, Associate Justice of the Supreme Court of the United States, for an extension of time within which

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[fol. 85] to file his petition for certiorari. This application was granted on May 3, and the time within which to file a petition for certiorari was extended to July 10, 1956. An important purpose of this Application to Justice Clark was to permit time for the Nebraska Supreme Court to pass squarely upon the issues raised in this motion in advance of any filing of a petition for certiorari.

A prompt determination by the Nebraska Supreme Court of the issues raised in this brief will expedite the final disposition of this case, obviate the inordinate delays of collateral proceedings, and avoid the troublesome legal problems posed by the conflicting jurisdiction of state and federal courts which attends the use of federal habeas corpus to review state court proceedings. Facts concerning the misconduct of defense counsel are in the present record. Considerable doubt surrounds the question of whether a hearing on plaintiff in error's alleged deprivation of constitutional rights can be obtained by a writ of error coram nobis prosecuted in the state courts. See, e.g., Hawk v. State, 151 Neb. 717, 39 N. W. 2d 561 (1949). Nor does it appear that habeas corpus will lie in the state court. E.g., Hawk v. Olson, 146 Neb. 875, 22 N. W. 2d 136 (1946). The only existing post-conviction procedure for a hearing on the merits of the questions posed hereafter would appear to be a petition for a writ of habeas corpus presented to the Federal District Court. Thus prolonged litigation may be avoided if the Court grants this motion, thus affording plaintiff in error a hearing on the matters herein urged at this time, with an orderly review by the Supreme Court of the United States if necessary. There would then be no

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[fol. 86] need for what Judge John J. Parker has called the "unseemly" review of state court action by an inferior federal court. See Parker, Limiting the Abuse of Habeas Corpus, 8 F.R.D. 171, 176 (1948). Counsel is in full accord with the philosophy behind the report of the Habeas Corpus Committee of the 1954 Conference of Chief Justices that "* * * orderly Federal Procedure under our dual system of government * * * should require that a final judgment of a State's highest court * * * [should] be subject to review or reversal only by the Supreme Court of the United States and not by inferior Federal tribunals." Quoted in H. R. Rep. No. 1200, 84th Cong., 1st Sess. 7 (1955). This objective will be achieved in this case if the Court will exercise its power to grant the motion at this time.

Ample authority in this state, and elsewhere, exists to support the right of the Supreme Court of Nebraska to review arguments not raised in trial proceedings. As stated by one learned author (Orfield, Criminal Appeals in America 97, 1939);

The courts show a greater liberality in criminal cases than in civil cases. This is particularly true as to questions of rights, privileges and immunities * * *. Capital cases receive the most liberal treatment.

In a case in the July Term, 1879, this Court was asked to examine the correctness of an instruction given by a trial court in a capital case. No exception had been taken at the trial by the defendant, and the point concerning the instruction had not been raised upon the first argument in the Nebraska Supreme Court. Nevertheless, upon a motion for rehearing, the Court found the instruction erroneous, re-

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[fol. 87] versed the judgment, and remanded the case for a new trial. Schlencker v. State, 9 Neb. 300, 2 N. W. 710 (1879). The Court said (at 302):

On the re-hearing of this case, our attention was specifically directed to certain of the instructions not before par-

ticularly complained of, and to which no exception was taken in the court below. This being a capital case, however, the want of an exception does not deprive the prisoner of his right to a new trial for errors of the court prejudicial to him.

An earlier case, Thompson v. The People, 4 Neb. 524, (1876), reached the same conclusion. The Nebraska Supreme Court reviewed the correctness of an instruction despite the fact that the defendants' counsel had raised no objection at the time the instruction was read by the trial judge. The Court stated at p. 530:

This instruction * * * is part of the record of the case, made so by statute, and is therefore properly before us.

* * * * * * *

Under these circumstances we deem it to be our plain duty to correct the wrong by awarding to the defendants a new trial.

The same opinion quoted with full approval a statement made by the Attorney General of Ohio while he was arguing a case for the State in which the error in a trial court's charge was first raised in the Supreme Court of Ohio:

"No man's life should be forfeited because of the omission of his counsel to take exception. The interests of public justice do not, in my opinion, require, or even permit me to urge this objection against considering any error in the charge of the court." (p. 531)

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[fol. 88] The same rule has been adopted in other states. See, e.g., State v. Holbrook, 98 Ore. 43, 192 Pac. 640 (1920); Quertermous v. State, 95 Ark. 48, 127 S. W. 951 (1910).

If it be true that the errors urged in this motion for a rehearing were not assigned in the original brief filed in this action, the reason was because counsel for the plaintiff in error who wrote the brief had personal reasons for not desiring this Court to pass upon his own folly and incompe-

tence. These personal reasons are specified at greater length in the following pages of this brief and will not be repeated here. It is submitted that this case falls within Rule 8 (a) (4) of the Reivsed Rules of the Supreme Court of Nebraska (1956):

* * * the court may, at its option, notice a plain error not assigned.

Proposition II.

Confessed criminal misconduct of chief defense counsel, Charles A. Fisher, deprived the plaintiff in error of the effective and unqualified representation of counsel required in state capital cases by the Fourteenth Amendment of the United States Constitution heretofore set forth.

At the opening of the tenth day of the trial, just before the closing arguments, the following proceedings took place (5:1234 to 18:1235):

By Mr. Clarke [special prosecutor]:

Before we proceed with the arguments, Your Honor, there is a matter that has been taken up with, Your Honor, which we wish to get into the record.

The Court: Very well.

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[fol. 89] Mr. Clarke: We wish the record to show that counsel for the defendant, is willing that it shall show, that this mroning [sic] in this court room, after the court reporter had brought all the exhibits in the case out and laid them on the reporter's desk, Mr. Fisher, one of the counsel for the defendant, while he was examining Exhibit No. 10, being the leather pants belt heretofore identified as the belt of Marvin Hansen, and that at that time he took a dowel, being one of the wooden dowels on the reporter's desk, and being either the same or one exactly like the one I am holding in my hand, which I will have to have marked as an exhibit, and pushed it violently—

Mr. Fisher: (Interrupting) I didn't violently push it—

Mr. Clarke: (Interrupting) pushed it through the hole in the belt hard enough so that it materially enlarged the size of the hole to an extent which cannot now be determined and that the belt, Exhibit No. 10, is not now in the same condition as it was when it was offered in evidence and received in evidence, and that the hole is now materially larger than it was before Mr. Fisher did that.

(Mark this dowel as an exhibit, please.)

(The wooden dowel referred to was marked as Exhibit No. 75.)

The Court: Mr. Fisher, as I understand it you have told counsel that you did that?

Mr. Fisher: Yes.

The Court: You recognize that the hole is larger?

Mr. Fisher: Yes.

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[fol. 90] The Court: The court admonishes all counsel and everyone else and the jury when they go to deliberate upon this matter to not probe these exhibits. They can make comparisons but they cannot probe these belts with any dowel or change the condition of any exhibits. Very well, you may proceed.

This misconduct of defense counsel has not been raised heretofore in the trial or appellate court, for the obvious reason that the attorney responsible, Charles A. Fisher, remained chief counsel for plaintiff in error until after the denial of the motion for a rehearing.

It would be difficult to imagine any act more prejudicial to the plaintiff in error than this disclosure that his chief attorney had so little confidence in his client's case, and was so irresponsibly dishonest, that he had tried to and did alter the size of the claimed bullet hole. The prosecution's

theory of the shooting made the question of whether or not the patrolman was killed with a .22 or .38 caliber gun a crucial fact, and the victim's belts were the only tangible evidence on that point. When the pants belt was introduced in evidence (E10,89), the jury was warned by the court: "Just examine the hole and do not probe it with anything." (22-23:89). The defense counsel's conduct in enlarging this hole was a flagrant disregard of his duty and responsibility to the court of which he was and perhaps still is an officer, to the bar which he represented, and to the client to whom he owed the duty of honest and effective representation. His action violated at least four of the Canons of Professional Ethics (Canons, 5, 15, 22 and 32); was a criminal contempt of the District Court of Cherry Coun-

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[fol. 91] ty (Neb. R. R. S. 1943, § 25-2121 and as such was a serious offense punishable by fine or imprisonment, see e.g., McCauley v. State, 124 Neb. 102, 245 N. W. 269 (1932); and was a crime under Neb. R. R. S. 1943, § 28-737, which makes it a misdemeanor to "obstruct or impede or endeavor to obstruct or impede the due administration of justice * * *."

From the moment when this tampering was brought to the attention of the jury defense counsel ceased to be able to aid his client and instead became an onerous and oppressive liability to the young man who now sits in the death row. What juror could listen with an unprejudiced mind to a man who, just before he was to argue the case for his client, stood before them in open court and abjectly confessed his grevious guilt and reckless dishonesty? From this point on, plaintiff in error was denied the assistance of counsel as required under the due process clause of the Fourteenth Amendment.

That this disclosure would be overwhelmingly prejudicial to his client must have been apparent to defense counsel. Yet counsel made no attempt to withdraw from the case or to protect his client by keeping from the jury the highly prejudicial but irrelevant fact that counsel had committed and confessed to this crime. He not only did not

object, but he was "willing that * * * [the record] shall show" what had taken place. He requested no instruction that the jurors should disregard his conduct and not impute his dishonesty to his client, and no such instruction was given by the court on its own motion.

The only explanation for this remarkable disregard of his client's rights and interests is that at that moment

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[fol. 92] defense counsel was thinking of himself only and about his day of reckoning. He faced the prospect of disbarment or other disciplinary action and perhaps criminal punishment by fine or imprisonment. His instinct for self-preservation and his concern to protect his own future as a practicing attorney must surely have overridden his obligation to defend his client "by all fair and honorable means," (Fifth Canon of Professional Ethics) and to give "entire devotion to the interest of the client." (Canon 15) To protect himself, in open court before the jury he was "willing" to go along with the obviously prejudicial error of permitting his client to be beclouded because of counsel's own confessed misconduct. He was in no position to antagonize the special prosecutor, or stand up to the court, and when the court asked him to confess before the jury, weakened and willing counsel confessed.

The case, therefore, is squarely within the holding of Glasser v. United States, 315 U. S. 60 (1942), that the assistance of counsel guaranteed by the Sixth Amendment of the United States Constitution requires that counsel not have a conflict of interest which would make the defense of his client less effective than it otherwise would have been. The Glasser case was a federal prosecution, but in state capital cases an equivalent right to effective assistance of counsel is imposed upon the states by the Fourteenth Amendment of the United States Constitution. See Powell v. Alabama, 287 U. S. 45 (1932).

The right to counsel under the Fourteenth Amendment in state capital cases is substantially equivalent to the right

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[fol. 93] to counsel in federal cases under the Sixth Amendment. For example, in a capital case states are required to provide counsel whether or not the defendant requests it. Williams v. Kaiser, 323 U. S. 471 (1945); Tompkins v. Missouri, 323 U. S. 485 (1945); Marino v. Ragen, 332 U. S. 561 (1947). And counsel must have sufficient time in which to prepare the case. Hawk v. Olson, 326 U. S. 271 (1945). Hence, the Sixth Amendment cases are applicable for the purpose of determining whether or not a defendant in a state capital case was given "effective" assistance of counsel as required by Powell v. Alabama, supra.

In Glasser v. United States, supra, an associate counsel employed to represent Glasser was also appointed by the Court to represent a co-defendant, and a conflict of interest arose over the admission of evidence prejudicial to Glasser but favorable to the co-defendant. The United States Supreme Court found that there was a constitutional deprivation of the right to counsel despite the fact that the defendant was himself an attorney, might have been considered to have waived objection to the appointment, and even though it was not apparent that the defendant was seriously prejudiced as a result. The Court said (315 U. S. 60 at 75-76):

To determine the precise degree of prejudice sustained by Glasser * * * is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice resulting from its denial.

Among the cases which have applied the rule of the Glasser case are the following: Craig v. United States, 217

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[fol. 94] F. 2d 355, (6th Cir. 1954) (conflict resulted in failure to make cross examination which might have benefited client); Scott v. District of Columbia, 99 A. 2d 641 (D. C. Mun. Ct. App., 1953), aff'd., 214 F. 2d 869 (D. C. Cir. 1954) (Counsel "revealed an embarrassed and gingerly attitude to his dual fiduciary capacity. * * * We think it was im-

possible for the trial attorney to have given defendant the undivided and undiluted fidelity to which he was entitled"); Wright v. Johnston, 77 F. Supp. 687 (N. D. Calif. 1948), modified on another point, 8 F. R. D. 358 (N. D. Calif. 1948) (court lost jurisdiction as soon as conflict of interest developed). See also Hayman v. United States, 187 F. 2d 456, 460 (9th Cir. 1951), vacated on other grounds, 342 U. S. 205 (1952); Noble v. Eicher, 143 F. 2d 1001 (D. C. Cir. 1944) (there is denial of right to counsel where attorney has conflict of interest, but remedy of writ of prohibition denied).

The case at bar involves a more prejudicial conflict of interest than any of the foregoing decisions. The consideration which diverted counsel from his duty in the instant case was not merely a conflicting obligation to another client but being brought to book himself and the threatened destruction of counsel's own legal career. Where a defendant is prejudiced as a result of such a conflict of interest, he is denied the effective assistance of counsel required by the Fourteenth Amendment as aforementioned. Counsel found himself in the anomalous position of "running with the hares and hunting with the hounds," while plaintiff in error stood unprotected.

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[fol. 95] Proposition III.

A defendant is denied a fair trial where the record shows that defense counsel was incompetent, engaged in criminal misconduct in the courtroom, and where the special prosecutor and the court forced defense counsel to confess his crimes and moral laxity in front of the jury.

The argument under Proposition II, supra, is based on the fact that defense counsel's confessed criminal misconduct and wrongs created such a conflict of interest between the plaintiff in error and his counsel that plaintiff in error was thereby deprived of his constitutional rights to the effective assistance of counsel as guaranteed to him as pre-

viously argued. For this reason alone, a new trial should be granted. However, the circumstances surrounding defense counsel's conduct resulted in errors beyond that of deprivation of counsel alone. A new trial is also required, in our opinion, because the defense counsel's incompetence and the actions of the court and the special prosecutor in dealing with defense counsel's misconduct were so prejudicial to plaintiff in error that he was thereby deprived of that fair trial guaranteed him under the Fourteenth Amendment to the United States Constitution.

The court and the special prosecutor also had very definite obligations to the plaintiff in error in the unprecedented situation which developed after defense counsel was caught enlarging the bullet hole in the belt. They were faced with a very difficult situation which required a mistrial unless it was possible to bring the ultimate facts to

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[fol. 96] the attention of the jury without prejudicing the defendant. It might have been feasible to instruct the jury that the condition of the hole had been changed, without implicating defense counsel, and reserving a forced confession in open court until after the trial. But this course was not pursued. The prosecutor chose to air the matter before the jury in open court in a way which seems to us deliberately calculated to prejudice the jury against the defendant and to destroy any possibility that the jury would fairly consider defense counsel's closing argument to them, which argument was highly important. The trial court not only acquiesced in this conduct, in apparent disregard of its duty to preserve the plaintiff in error's fundamental right to a fair trial, but the court permitted defense counsel to make a confession in open court before the jury, and then permitted the trial to proceed just as if nothing had happened.

In Glasser v. United States, supra, the Court said (315 U. S. 60 at 76):

Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to

refrain from embarrassing counsel in the defense of an accused by insisting, or indeed, even suggesting, that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the court.

Here the trial court, by insisting that defense counsel confess to his crime and admit moral turpitude, not only embarrassed and prejudiced the defense of the accused but destroyed any possible effectiveness defendant's counsel might have with the jury. From that time on Charles A.

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[fol. 97] Fisher was legally emasculated. The spectacle of the special prosecutor, and the court, in diverting the attention of the jury from the question of the guilt of the accused, and from the task of fixing his punishment, to the irrelevant question of the guilt of his counsel shows a shocking disregard of the defendant's right to a fair trial.

This exploitation of defense counsel's misconduct occurred in a case already marred by the permeating incompetence of defense counsel and misconduct of the prosecutor. Defense counsel had failed to request a change of venue despite evidence of strong public feelings about the case in Cherry County. He failed to object to the admission of the confessions on the ground that they violated due process under the United States Constitution, and failed to raise or argue any federal constitutional issues at any point. He failed to request an instruction to supplement the court's instruction on the confessions, as a result of which the jury was never properly instructed on the law that the use of a confession obtained by psychological coercion violates due process. He failed to object to the admission of the so-called confession of April 11, 1954, on the ground that the only words contained in it which related to the crime for which plaintiff in error was on trial were admittedly false, misleading and highly prejudicial. He failed to object to the characterization of defendant's signed statements as confessions, although they failed to meet the requirement laid down by this Court in Bush v. State, 112

Neb. 384, 387 (1924) that to be a confession a statement must admit all of the essential elements of a crime. In his

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[fol. 98] cross-examination of the state's witnesses, he failed to bring out a crucial inconsistency in the prosecution's evidence whereby through the use of confessions the prosecution sought to prove that the last of the shots fired was the fatal shot, whereas the testimony of state witnesses at the trial developed the theory that the first shot fired was the one which killed the patrolman. Nor were any of the foregoing points raised by defense counsel in this Court, although taken together they constitute the heart of the defenses available to plaintiff in error in this case.

Courts have been understandably reluctant to upset convictions on the sole grounds of defense counsel's incompetence. See, e.g., Diggs v. Welch, 148 F. 2d 667 (D. C. Cir. 1945), cert. denied, 325 U. S. 889 (1945). In the case cited the Court pointed out that "there are no tests by which it can be determined how many errors an attorney may make before his batting average becomes so low as to make his representation ineffective." Id. at 670. But where an extreme case is shown, as in Jones v. Huff, 152 F. 2d 14 (D. C. Cir. 1945), and Wilcoxen v. Aldredge, 192 Ga. 634, 15 S. E. 2d 873 (1941), or where the incompetence of counsel is compounded by other errors, Wilson v. State, 51 N. E. 2d 848 (Ind. 1943), the courts have found a denial of the fair trial required by due process of law. The case at bar presents such an extreme case. Not only was there gross incompetence by defense counsel, but the record shows the exploitation of counsel's gross and criminal misconduct by the prosecutor and the failure of the trial court to take steps which would insure a fair trial. Other alleged errors of the special prosecutor were pressed in the briefs and

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[fol. 99] oral arguments heretofore presented and therefore will not be repeated here, but it is relevant to note that a part of the special prosecutor's argument to the jury was

found by this Court to be "improper" and "error." Grandsinger v. State, 161 Neb. 419, 448, 73 N. W. 2d 632, 651 (1955).

Proposition IV.

The use at the trial of all, or any one, of the three purported confessions obtained under the circumstances disclosed by the transcript and bill of exceptions deprived plaintiff in error of his life and liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

The most recent pronouncement of the United States Supreme Court holding the use of a confession in a state criminal trial in violation of the Fourteenth Amendment is Leyra v. Denno, 347 U. S. 556, (1954). Here the Court held that the confession was the culmination of a series of events which showed that the will of the individual under interrogation was reduced to a mental state of exhaustion and was therefore "coerced" just as much as if physical abuse had been used to pry the incriminating words from the defendant. The Court said that (347 U. S. at 558):

The use in a state criminal trial of a defendant's confession obtained by coercion—whether physical or mental—is forbidden by the Fourteenth Amendment.

And in Stein v. New York, 346 U. S. 156 (1953) the majority opinion stated (at 184):

Of course, a process of interrogation can be so pro-

[fol. 100] longed and unremitting, especially when accompanied by deprivation of refreshment, rest or relief, as to accomplish extortion of an involuntary confession.

The dissenting opinion of Mr. Justice Frankfurter in the same case suggests that "police pressures" applied to individuals to extract confessions "* * * may reach a point where confessions, although not resulting from the applica-

tion of physical force, are as a matter of human experience equally the results of coercion in any fair meaning of that term and therefore not 'voluntary' in any relevant sense." 346 U. S. at 199.

To determine whether or not a confession is the product of coercion and therefore inadmissible under the Fourteenth Amendment it is necessary to consider all the relevant facts. No one factor is decisive one way or another, and the determination cannot be made with mathematical precision or by the mechanical application of a single formula. Thus in Stein v. New York, supra at 185, the Court said:

The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing.

This question "can only be answered by reviewing the circumstances surrounding the confession." Leyra v. Denno, supra at 717. The factors deemed to be relevant have been indicated in a long series of cases following Brown v. Mississippi, 297 U. S. 278 (1936), the first case in which the admission of a confession in a state case was held to violate federal due process. Of course, physical violence or threats of violence invalidate "confessions that would otherwise

[fol. 101] be convincing" and "there is no need to weigh or measure its effect on the will of the individual victim." Stein v. New York, supra at 182. The threat of mob violence is important in determining whether the defendant was coerced. Chambers v. Florida, 309 U. S. 227 (1940); Lisenba v. California, 314 U. S. 219 (1941). The fact that personal indignities are heaped upon the prisoner is relevant, Malinski v. New York, 324 U. S. 401 (1945), and the age and education of the prisoner must be evaluated. Haley v. Ohio, 332 U. S. 596 (1947); White v. Texas, 309 U. S. 530 (1940); Ward v. Texas, 316 U. S. 547 (1942).

The conditions surrounding the interrogation itself are of prime importance—facts such as the place of interrogation, the time of day or night, the number of questioners,

the intensity of interrogation and whether done by relays of officers or single interrogators, and the amount of rest permitted. See Ashcraft v. Tennessee, 322 U. S. 143 (1944); White v. Texas, supra; Haley v. Ohio, supra; Harris v. South Carolina, 338 U. S. 68 (1949). The fact that the prisoner was not given food until after the confession was obtained is a significant factor to be weighed in determining whether the confession was coerced. Watts v. Indiana, 332 U. S. 49 (1949). The same is true of the fact that the prisoner's constitutional rights were not explained to him at the time the confession was obtained. Harris v. South Carolina, supra.

Two other factors have received especially close scrutiny. One is whether the prisoner was held incommunicado during the interrogation period and for varying lengths of

[fol. 102] time after the confession was obtained. See Malinski v. New York, supra; Haley v. Ohio, supra; Turner v. Pennsylvania, 338 U. S. 62 (1949), in all of which convictions were reversed in decisions stressing this factor. Second, the Court has closely examined the facts to determine whether or not there was a violation of state law because of undue delay between arrest and preliminary examination before a committing magistrate. See Ward v. Texas, supra; Watts v. Indiana, supra; Turner v. Pennsylvania, supra. Although undue delay before a preliminary hearing does not of itself render the confession illegal (as is true in the federal courts, cf. McNabb v. United States, 318 U. S. 332, 1943), the failure to follow state rules of criminal procedure which require that a prisoner be charged before a magistrate "without undue delay" or "forthwith" has become of great importance when coupled with other indications of coercion detailed above.

Under the above decisions, the facts surrounding the confessions in the case at bar show that they were involuntary as a matter of law under the due process clause of the Fourteenth Amendment. Although the plaintiff in error testified that he was physically abused (13:435; 10:441; 13-14:443) and threatened (15:435; 8:443; 25:435 to 4:436),

this was denied except for the admission of Sheriff Freeman that he turned Grandsinger's head around (14:534; 12:580). For the purposes of this motion it will be assumed that all disputed allegations were resolved against the plaintiff in error, and the following description of the circumstances under which the confessions were obtained is based only on uncontroverted testimony.

1. The Arrest. Plaintiff in error was arrested at 3:00

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[fol. 103] p. m. on Friday, April 9, 1954 (22:565). At the time of his arrest he was physically and emotionally exhausted. He had not eaten for at least 24 hours, or since noon or soon thereafter on Thursday (8:937; 7:478; 17:489 to 9:490), and had not slept for a longer period (22:480). For 16 hours he had been trying to elude capture, and just before he was captured he was nearly drowned in the Niobrara River. He tried to swim the river, and in the words of the witness who effected his capture, the "strong currents" in the river "took him under" and he didn't reappear "for quite a while and I thought he was gone for good, and then it has a back current there and he reappeared." He was swept under water for 75 feet, and then clung to a log (5-18:947). His condition immediately after he was taken from the water was described by a state officer as: "he was soaked with water, and his general appearance was well, pretty run down, and his hair was all bushy, and one pants leg was missing, and he was pretty wild looking." (10-13:733). A posse member described his condition at that time as "very poor" (1:943), and a reporter who saw him soon thereafter said "* * * he was dirty, and he looked like probably any man would that was being chased by a posse for 16 hours. * * * He looked bad, yes." (4-9:579). For a photograph of plaintiff in error in this condition, see E73.

Psychological pressure accompanying the arrest would further weaken the resistance of any man who was already in this run-down physical condition. A posse of 300 to 400 men had been combing the hills for him (21:658). After

plaintiff in error had surrendered, but while he was still clinging to the log in the river, a member of the posse went

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[fol. 104] out into the river to get him. This posse member testified that another member of the posse fired at plaintiff in error, and "probably would have shot me if somebody hadn't jammed or knocked his gun down, and he shot under both of us. * * * He was shooting right underneath the log where we were." (7-14:940). As plaintiff in error was taken from the river to a car there were crowds of armed men around him (21:577, 22:981). They talked about shooting him and "some of them said we will give him what he gave the patrolman the night before." (12-21:941). Those taking plaintiff in error to the car had to warn other members of the posse "to handle their guns a little more careful." (2:942).

Plaintiff in error was taken immediately to Valentine and upon arrival at the courthouse was taken directly to the room where interrogation took place, without any opportunity for food, rest or change of clothing (20:384). There was a crowd of persons both inside and outside the courthouse (13:537, and see E74, a photograph of plaintiff in error being "hustled" into the courthouse through a crowd, and E73, a photograph of plaintiff in error being brought upstairs in the courthouse through a throng of officers and onlookers). Thus even without plaintiff in error's controverted allegation that the sheriff threatened him that "the crowd would take care of me" if he didn't confess (3:1001), the undisputed circumstances would have put any reasonable man in fear of mob action. They lend weight to plaintiff in error's assertion that he only signed the first confession because "I felt that if I didn't sign it that, well, my life wasn't worth living another minute afterwards * * *." (9-12: 440).

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[fol. 105] Thus the stage was set for the interrogation of a man exhausted from being hunted in rough country for 16 hours by a large posse aided by aircraft, without food or

sleep for more than 24 hours, chilled and groggy from having nearly drowned, and frightened from having been fired at after he had surrendered, from threats of lynching, and from the crowds around him at his capture and at the courthouse.

2. Interrogation. The questioning started immediately after plaintiff in error arrived at the courthouse (8:385, 20:384), which was about 3:30 p. m. (12:384). Sometime after 9 p. m. he signed the first purported confession (10:646, 1:410 to 9:412). During this period of about six hours he was kept continuously under questioning or in the office where the statement was being transcribed (17-19:371, 12-14:377, 1:634). He was not allowed to eat anything until he had signed the statement (8:540), and was not allowed to change from his wet clothes with the missing pant leg until 9:30 p. m. (8:553). This first "confession" did not satisfy the officers, and after a respite of about 30 minutes duration (19:440), during which he was given food, questioning was resumed at 10 p. m. Friday (15:389) and continued until 3 a. m. Saturday morning (18-23:565). Thus except for the 30 minutes interval referred to, he was under continuous pressure to confess for 12 hours after his arrest (ibid).

The investigation was resumed at 9 or 10 a. m. Saturday (5-8:390). He was questioned at the scene of the crime for "4 or 5 hours" (11:429), or at least until 2:30 (13:429) or 3:00 p. m. (16:567). That evening and into the early hours

[fol. 106] of Sunday he was interrogated "at great length" (5-9:395). He was again interrogated Sunday morning (22:393), and on Sunday "afternoon and evening" (23:330) was turned over to South Dakota and federal officials for questioning about crimes allegedly committed the night before the homicide. These officers took another statement from him between 6:00 and 10:00 p. m. Sunday evening (1-8:331). Although there is little in the record as to what happened thereafter, evidently he was still being questioned on Monday, for on that day he was brought into the

county attorney's office to identify allegedly stolen goods found in his car (1-4:722).

An indication of the intensity of the questioning to which he was subjected by Nebraska authorities is indicated by the testimony of the post office inspector from South Dakota, who was present when plaintiff in error was first brought to the courthouse on Friday afternoon. He wished to question plaintiff in error and asked to be notified when that would be possible, but he had to wait until Sunday afternoon (2-9:590).

A number of different officers took part in these interrogations. At the first interrogation an officer was assisted by a pharmacist (24:604, 18-19:606) who had no connection with law enforcement agencies. The defendant's size does not appear in the record, but he is described as "slightly built" (22:603). Among those questioning him were men described as 6' 4" tall and 212 lbs. (23-29:569), 6' 1" tall and 229 lbs. (25:388 and 389), 6' tall and 175 lbs. (22-23:388), another "fairly large man" (25:603 and 1:604) and a "big man" (2-3:604). Plaintiff in error is described as being smaller than the smallest of his interrogators, who

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[fol. 107] was 5' 7" tall and 160 lbs. (7:604). An indication of the size of plaintiff in error may be obtained by comparing his size with that of the officers surrounding him in photographs E53 and E73.

3. Illegal detention. Although plaintiff in error was arrested on Friday afternoon, he was not given a preliminary hearing until some time Monday, April 12 (Tr. 8). Sheriff Freeman admitted that plaintiff in error was held incommunicado and that no one was permitted to see him until "a couple of days" after the preliminary hearing (22:550), and until this time he had no lawyer and his relatives were not permitted to see him (20-22:452).

Plaintiff in error was arrested without a warrant; the warrant which appears in the transcript is dated three days after he had been taken into custody (Tr. 6). In Nebraska

detention following arrest without a warrant is legal only until a legal warrant can be obtained. Neb. R. R. S. 1943, § 29-401, which in this case could have been done immediately. Once this warrant is issued, the defendant must be brought before a magistrate "forthwith," Neb. R. R. S. 1943, § 29-406. During the detention in this case, from 3 p. m. Friday until some time Monday, plaintiff in error was continuously confined in the courthouse at Valentine, and the preliminary hearing could presumably have been held any time. In the absence of evidence demonstrating the necessity of such a delay, the delay here is unreasonable as a matter of law.

These facts raise serious doubts about whether the confessions in this case were obtained by means which the United States Supreme Court has held to violate the fed-

[fol. 108] eral due process clause. Counsel for plaintiff in error realizes that these questions were not explored fully in the briefs heretofore filed in this case, and respectfully submits that this Court should consider them upon a rehearing.

In Ward v. Texas, supra at 555, the opinion of the United States Supreme Court concluded with these words:

This Court has set aside convictions based upon confessions extorted from ignorant persons who have been subjected to persistent and protracted questioning, or who have been threatened with mob violence, or who have been unlawfully held incommunicado without advice of friends or counsel, or who have been taken at night to lonely and isolated place for questioning. Any one of these grounds would be a sufficient cause for reversal. (Citations omitted).

Plaintiff in error is entitled to have the validity of his confessions under the due-process clause of the Federal Constitution passed upon by the Supreme Court of Nebraska.

Conclusion.

For the foregoing reasons it is hereby respectfully requested that the Supreme Court of the State of Nebraska grant plaintiff in error an Amended and Supplemental Motion for Rehearing in this action.

Respectfully submitted,

EUGENE D. O'SULLIVAN, SR.,
Counsel for Plaintiff in Error.

[fol. 109] Exhibit "D."

(Petition for Writ of Certiorari filed in Supreme Court of United States)

In The Supreme Court Of The United States.

October Term, 1956.

Loyd Carroll Grandsinger, Petitioner,
vs.
State of Nebraska, Respondent.

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[fol. 112] Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Nebraska

Loyd Carroll Grandsinger prays that a writ of certiorari issue to review the judgments of the Supreme Court of Nebraska, entered in the above-entitled case on February 11, 1956 and June 30, 1956.

Citations to Opinion Below.

The only written opinion of the Supreme Court of Nebraska, a copy of which is appended hereto, is reported in 161 Neb. 419, 73 N.W. 2d 632 (1955).

Jurisdiction.

The opinion of the Supreme Court of Nebraska was filed on December 16, 1955. A motion for rehearing was denied on February 11, 1956. On May 3, 1956, Mr. Justice Clark extended the time to file the petition for a writ of certiorari to and including July 10, 1956. On the same day Mr. Justice Clark stayed petitioner's execution pending the final disposition of the petition for certiorari. On June 18, 1956, the Supreme Court of Nebraska granted a motion for leave of court to file an amended and supplemental motion for rehearing out of time. On June 30, 1956, the amended and supplemental motion for rehearing was denied. The jurisdiction of this court is invoked under 28 U.S.C. Section 1257(3).

[fol. 113] Questions Presented.

1. Was petitioner, a defendant in a state capital case, denied due process under the Fourteenth Amendment to the United States Constitution:

(a) Where defense counsel was caught during the trial tampering with evidence introduced in the case by the State, was forced to confess his criminal misconduct in open court before the jury, thereby debasing and disgracing himself and his much harried client, and thus placing himself in a situation in which his own interests in protecting his professional future were adverse to the duties he owed his client, and where this conflict of interest prevented him

from giving petitioner effective and unqualified representation by counsel; and/or

(b) Where the exploitation of defense counsel's misconduct by the prosecutor and trial court, coupled with defense counsel's general incompetence, particularly in failing to make proper and adequate objections in preserving federal questions for review, and other misconduct of the prosecutor and the failure of the trial court to protect petitioner's essential rights, deprived petitioner of a fair trial.

2. Did the admission and use of petitioner's confessions constitute a denial of due process under the Fourteenth Amendment to the United States Constitution.

Constitutional Provisions And Statutes Involved.

Constitution of the United States of America, Article XIV, Section 1:

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *"

Nebraska Revised Statutes, Section 28-401:

"Whoever shall purposely and of deliberate and premeditated malice * * * kill another; * * * every person so [fol. 114] offending shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death or shall be imprisoned in the penitentiary during life, in the discretion of the jury."

Nebraska Revised Statutes, Section 29-401:

"Every sheriff, deputy sheriff, constable, marshal or deputy marshal, watchman or police officer shall arrest and detain any person found violating any law of this state, * * * until a legal warrant can be obtained."

Nebraska Revised Statutes, Section 29-406:

"The warrant shall be directed to the sheriff or to any constable of the county, * * * and, reciting the substance of

the accusation, shall command the officer forthwith to take the accused and bring him before the magistrate or court issuing the warrant, or some other magistrate having cognizance of the case, to be dealt with according to law, * * *"

Statement.

Petitioner and his brother were stopped by two officers on a lonely country road in the very rough and thinly inhabited ranch area near Valentine, Nebraska, about 11:30 p.m. on Thursday, April 8, 1954. In the ensuing melee, before other officers arrived from a nearby roadblock, numerous shots were fired, petitioner escaped into the darkness, his brother surrendered, and, a few moments later, one of the officers was found to have been shot and killed. The next morning a posse of three or four hundred men was organized, and at 3 p.m. that afternoon, Friday, April 9, 1954, petitioner was captured after he was nearly drowned trying to swim across the Niobrara River. He was taken immediately to Valentine, Nebraska for questioning, signed a confession at 9 that evening, was questioned most of the rest of that night, made another statement at the scene of the crime at noon the next day, Saturday, April 10, 1954, and signed another confession about 9 p.m. on Sunday, April 11. A warrant for his arrest was issued on Monday, April 12 (Tr. 6), and on that day, as yet unrepresented by counsel, he was arraigned, pleaded "not guilty," and waived a preliminary hearing (Tr. 8).[1] Petitioner was not allowed [fol. 115] to contact relatives or a lawyer until "a couple of days" after the preliminary hearing (B.E. 529).

On June 2, 1954, petitioner went on trial for first degree murder before a jury in the District Court of Cherry County, Valentine, Nebraska. (Tr. 84) During the trial the state introduced petitioner's confession of Friday, April 9 (Ex. 19; B.E. 650), and his confession of Sunday, April 11 (Ex. 25; B.E. 340, 582). Evidence was taken out of the hearing of the jury as to the circumstances surrounding

[1] Throughout this petition the abbreviation Tr. refers to the typewritten Transcript; the abbreviation Ex. refers to the Exhibits in the case, and the abbreviation B.E. refers to the typewritten Bill of Exceptions.

the confessions. The trial court held that they were not inadmissable as a matter of law (B.E. 581), and the confessions of April 9th and April 11th were thereafter submitted to the jury. A state's witness was also permitted to read a statement of petitioner taken at the scene of the crime on Saturday, April 10, which the witness had transcribed but which petitioner had not read or signed (B.E. 669-700). Petitioner took the stand in his own defense and throughout asserted his innocence.

On the tenth day of the trial, after the evidence was all in and just before final arguments to the jury, an episode took place which is of such importance in this case that it is reproduced in full (B.E. 1234-1235):

"By Mr. Clarke [special prosecutor]:

Before we proceed with the arguments, Your Honor, there is a matter that has been taken up with, Your Honor, which we wish to get into the record.

The Court: Very well.

Mr. Clarke: We wish the record to show that counsel for the defendant, is willing that it shall show, that this morning [sic] in this court room, after the court reporter had brought all the exhibits in the case out and laid them on the reporter's desk, Mr. Fisher, one of the counsel for the defendant, while he was examining Exhibit No. 10, being the leather pants belt heretofore identified as the belt of Marvin Hansen, and that at that time he took a dowel, being one of the wooden dowels on the reporter's desk, and being either the same or one exactly like the one I am holding in my hand, which I will have to have marked as an exhibit, and pushed it violently—

Mr. Fisher: (Interrupting) I didn't violently push it—

Mr. Clarke: (Interrupting) pushed it through the hole [fol. 116] in the belt hard enough so that it materially enlarged the size of the hole to an extent which cannot now be determined and that the belt, Exhibit No. 10, is not now in the same condition as it was when it was offered in evidence and received in evidence, and that the hole is now materially larger than it was before Mr. Fisher did that.

(Mark this dowel as an exhibit, please.)

(The wooden dowel referred to was marked as Exhibit No. 75.)

The Court: Mr. Fisher, as I understand it you have told counsel that you did that?

Mr. Fisher: Yes.

The Court: You recognize that the hole is larger?

Mr. Fisher: Yes.

The Court: The court admonishes all counsel and everyone else and the jury when they go to deliberate upon this matter to not probe these exhibits. They can make comparisons but they cannot probe these belts with any dowel or change the condition of any exhibits. Very well, you may proceed."

Immediately after this episode Mr. Fisher, defense counsel, made the final argument to the jury on behalf of petitioner. The jury found petitioner guilty of murder in the first degree and set the penalty at death. (Tr. 75) A motion for a new trial was denied (Tr. 90), the Nebraska Supreme Court affirmed the conviction on December 16, 1955 (see opinion appended hereto), and a motion for rehearing was denied on February 11, 1956.

How Federal Questions Were Presented.

Until after the denial of the first petition for rehearing in the Nebraska Supreme Court, petitioner was represented by Mr. Fisher, the attorney involved in the episode quoted above, and the federal questions presented herein were not raised for the obvious reason that the counsel was in no position to advance his own criminal misconduct as grounds for a new trial. After present counsel entered the case, the federal questions were raised by petitioner by an amended and supplemental motion for rehearing. On June 11, 1956, petitioner filed with the Nebraska Supreme Court a motion for leave to file an amended and supple- [fol. 117] mental motion for rehearing, in which petitioner

asked the Nebraska Supreme Court to review only the same federal questions presented here. (Tr. unpaged) A copy of this typewritten motion for leave is in Appendix A. On June 18, 1956, the Nebraska Supreme Court granted the motion for leave to file, thereby resolving in petitioner's favor the question of state procedural law as to whether or not the federal questions could be presented for decision in a second petition for rehearing filed out of time. On the same day petitioner filed his amended and supplemental motion for rehearing and supporting brief, a copy of which is appended hereto as Appendix B. The motion for rehearing again raised no issue except the same federal questions presented herein, and since the Nebraska court had already ruled that the motion could be filed, the motion raised no points for decision except the merits of the federal questions. On June 23, 1956, oral argument was had, solely directed to the federal questions which were the only issues presented for decision in the motion. On June 30, 1956, the motion for rehearing was overruled by the Supreme Court of Nebraska, the highest court in the state.

Under Nebraska criminal procedure, an amended and supplemental motion for rehearing, filed after leave of court is first obtained, is a proper way to raise federal questions under the Fourteenth Amendment. The Nebraska Supreme Court, by granting permission to file the amended motion, brought before the court and expressly decided the federal questions.

Furthermore, petitioner was prevented from raising the federal questions earlier because the issues were based on the confessed criminal misconduct of petitioner's trial counsel who theretofor represented him. The federal questions were thus raised at the earliest opportunity and in the only way provided by Nebraska procedural law, and the denial of the amended and supplemental motion for rehearing was an express decision by the highest court in Nebraska adverse to the merits of the federal questions.

Reasons For Granting The Writ.

Summary

The general areas of law involved in the questions presented in this petition—right to counsel in state capital

cases and the use of allegedly coerced confessions—are [fol.118] familiar and important sources of litigation in this Court. But the precise questions presented by this petition have never been settled by this Court. Their resolution affects not only petitioner, who is now under sentence of death in the Nebraska penitentiary, but is important in the adminstration of the criminal law.

It was established in Powell v. Alabama, 287 U.S. 45 (1932), that the right to counsel in state capital cases means that the assistance of counsel must be effective and not a mere sham. It is established in federal law by Glasser v. United States, 315 U.S. 60 (1942), that if counsel is handicapped by a conflict of interest which prejudices his defense of his client, such representation by counsel does not meet minimum constitutional standards for effectiveness under the Sixth Amendment. This case poses the question of whether or not the rule of the Glasser case also applies to the right to counsel under the Fourteenth Amendment in state capital cases. If the Glasser case is applicable, it is believed that the judgment of the Nebraska Supreme Court of June 30, 1956, is clearly erroneous, for counsel in the instant case was wholly disabled from protecting his client's interests and petitioner was severely prejudiced as a result. The Nebraska judgment in this case apparently rests upon the premise that the Glasser case is inapplicable to state capital cases and that the right to counsel under the Fourteenth Amendment involves a different and lesser standard of what constitutes "effective" assistance of counsel than applies under the Sixth Amendment. The question of whether it is correct that the Fourteenth Amendment contemplates a lower standard in the calibre of representation of state defendants charged with capital crimes than is required for all federal defendants is one of far reaching importance.

Whether the admission and use of confessions obtained under circumstances disclosed by the record in the instant case denied petitioner due process of law likewise presents an undecided question. Prior decisions of this Court have settled that when the pressure to confess, whether physical or mental, exerted against a defendant is so great that it

wears away the defendant's resistance, a resulting confession is involuntary and its use deprives the defendant of due process of law. But the cases previously decided by this Court have involved circumstances in which a defendant's resistance was worn away by prolonged official ques-[fol. 119] tioning after he had been taken into custody. While that circumstance is also present in the instant case, because the undisputed evidence shows petitioner was subjected to prolonged and intensive police interrogation while he was being held incummunicado in illegal detention, the instant case presents undisputed testimony which shows that petitioner's normal mental faculties had been largely destroyed, mostly by long exposure to the elements of nature, before the interrogation ever started. When petitioner was led into the Valentine, Nebraska courthouse for the first twelve hours of intensive questioning, he was already in a state of fear and physical exhaustion. He had been without food and sleep for more than 24 hours, running from a heavily armed posse through rugged Nebraska sandhill terrain for nearly 16 hours, had nearly drowned trying to swim a swift flowing river just before his capture, had been shot at after he had surrendered and threatened with lynching after he was in custody, and was intimidated by crowds of armed men swarming around him at the scene of his capture and at the courthouse. The issue that is posed, therefore, is whether or not such circumstances are to be considered in determining whether petitioner's confessions were voluntary, when they arose prior to the initiation of actual interrogation. It is submitted that petitioner's physical and emotional condition at the time of his capture is a relevant circumstance in the determination of whether his subsequent confessions were voluntary, that these circumstances in conjunction with the uncontroverted evidence concerning petitioner's prolonged interrogation clearly demonstrate that his confessions were involuntary as a matter of law, that no man should be put to death as a result of a conviction obtained largely through the use of such confessions, and that since the situation is one which is likely to recur the question ought to be settled by this Court.

Question 1.

The judgment of the Supreme Court of Nebraska denying the amended motion for rehearing is in apparent conflict with the decision of this Court in Glasser v. United States, 315 U.S. 60 (1942). The Glasser case, and decisions of the Courts of Appeal following it, have established the rule that in federal cases the right to counsel established by the Sixth Amendment requires that counsel not have a [fol. 120] conflict of interest which would prejudice the defense of his clients. While this precise question has not arisen in cases construing the right to counsel under the due process clause of the Fourteenth Amendment in state capital cases, the nature of the right to counsel where required in state cases by federal due process is substantially equivalent to the right to counsel in federal cases under the Sixth Amendment. The requirement that representation of counsel can not be a mere sham but must be "effective" arose in a state capital case, Powell v. Alabama, 287 U.S. 45 (1932), and it is inconceivable that the Glasser holding that assistance of counsel is not "effective" when counsel is disabled by a conflict of interest would not be applicable in state capital cases. That there is still uncertainty on this point, however, is indicated by the judgment of the Nebraska Supreme Court in this case, and this emphasizes the importance of settling this question by a decision of this Court and of implementing the requirement of Powell v. Alabama, supra, that the assistance of counsel be effective.

If the Glasser case is applicable, as we believe it to be, the judgment in the instant case is in direct conflict with it. In the Glasser case, an associate counsel employed to represent Glasser was also appointed by the court to represent a co-defendant, and a conflict of interest arose over the admission of evidence prejudicial to Glasser but favorable to the co-defendant. In the instant case, when the court and prosecutor forced defense counsel to confess his criminal misconduct before the jury, the consideration which diverted counsel from his duty to his client was not merely a conflicting obligation to another client but the threatened destruction of counsel's own legal career and serious fines and jail terms.

Under the prosecution's theory of the shooting in the instant case, the question of whether or not the deceased patrolman was killed with a .22 or .38 calibre gun was a crucial fact, and the size of the hole in the victim's belts was the only tangible evidence on that point. When defense counsel was caught tampering with the pants belt and trying to enlarge the bullet hole, he found himself in a desperate predicament. His action was a criminal contempt of the trial court, Neb. Rev. Stats. §25-2121 (Reissue 1948), [fol. 121] and as such was a serious offense punishable by fine or imprisonment, see, e.g., McCauley v. State, 124 Neb. 102, 245 N.W. 269 (1932); and was a crime under Neb. Rev. Stats. § 28-737 (Reissue 1948), which makes it a misdemeanor to "obstruct or impede . . . the due administration of justice . . . " Under these circumstances it is understandable why counsel, when the court and prosecutor forced him to confess his crime before the jury, abandoned his obligations to his client in a desperate effort to save himself from threatened disbarment and criminal prosecution.

That the disclosure to the jury of what counsel had done would have been overwhelmingly prejudicial to his client must have been apparent to counsel. Yet he made no attempt to withdraw from the case or have the situation handled in a way that would protect his client by keeping from the jury the highly prejudicial but irrelevant fact that counsel had committed and confessed to this crime. He not only did not object, but he was "willing that . . . [the record] should show" what had taken place. He requested no instruction that the jurors should disregard his conduct and not impute his dishonesty to his client, and no such instruction was given by the court on its own motion. The only explanation for this remarkable disregard of his client's rights is that counsel's overriding instinct for professional self-preservation and his desire to avoid a fine and a jail term, if possible, made him unwilling to antagonize the prosecutor or stand up to the court. When the prosecutor and court forced counsel to confess before the jury, weakened and willing counsel confessed. Thus the case is squarely within the Glasser rule, which comes into operation when, because of conflicting obligations, "it was impossible for the trial attorney to have given defendant

the undivided and undiluted fidelity to which he was entitled." Scott vs. District of Columbia, 99 A. 2d 641 (D.C. Mun. Ct. App. 1953), aff'd 214 F.2d 860 (D.C. Cir. 1954).

In the Glasser case this Court said that it was "unnecessary" to determine the precise degree of prejudice which resulted from counsel's conflict of interest because "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice resulting from its denial." 315 U.S. 60 at 75-76. In the instant case, however, the prejudice to the defendant was overwhelming. The evidence was close, with much of the state's case rest-
[fol. 122] ing on disputed alleged "confessions." Yet at the climax of the trial, when the evidence was in and the jury was prepared to hear arguments of counsel, the effectiveness of counsel was destroyed. From the moment when the tampering with the evidence was brought to the attention of the jury defense counsel ceased to be able to aid his client and instead became an onerous and oppressive liability. In a case such as this which turned largely on circumstantial evidence since there were no eye witnesses to the crime and neither the fatal bullet or the murder weapon was ever found, petitioner needed an attorney to evaluate the evidence, point out inconsistencies, and draw inferences in petitioner's favor from the evidence. But what juror could listen with an unprejudiced mind to a man who, just before he was to argue the case for his client, stood before him in open court and was forced to abjectly confess his grievous guilt and reckless dishonesty? Because a Nebraska jury fixes the punishment if it is to be death, the closing argument by a counsel unclouded by his own immoral and criminal acts is of the utmost importance. From this point on, petitioner was denied the assistance of counsel required in state capital cases under the due process clause of the Fourteenth Amendment.

Not only did petitioner's counsel commit this criminal activity, but the special prosecutor brought the fact forcefully to the knowledge of the jury, and the trial judge did

nothing to caution the jury concerning it. The prosecutor's exploitation of defense counsel's misconduct occurred in a case already marred by the permeating incompetence of defense counsel and misconduct of the prosecutor. One instance of the prosecutor's conduct was found by the Nebraska Supreme Court to be "improper" and "error" but not sufficient grounds for reversal. Grandsinger vs. State, 161 Neb. 419, 448, 73 N. W. 2d 632, 651 (1955). Defense counsel had failed to request a change of venue despite evidence of strong feeling against the defendant because of his Indian extraction. He failed to object to the admission of the alleged confessions on the grounds that they violated federal due process. He failed to object to the admission of the so-called confession of April 11, 1954 on the ground that the only words contained in it relating to the crime for which petitioner was on trial were admittedly not petitioner's words. In his cross-examination of the state's witnesses, defense counsel failed to bring out a [fol. 123] crucial inconsistency in the prosecution's evidence whereby through the use of alleged confessions the prosecution sought to prove that the last of the shots fired was the fatal shot, whereas the testimony of state witnesses at the trial developed the theory that the first shot fired was the one which killed the patrolman. Nor were any of the foregoing points raised by defense counsel in the Supreme Court of Nebraska as long as original defense counsel was still in the case, although taken together they constitute the heart of the defenses available to petitioner in this case. Under these circumstances, the spectacle of the prosecutor and the court diverting the attention of the jury from the case of the accused to the irrelevant and highly prejudicial question of the guilt of his counsel shows a shocking disregard of petitioner's right to a fair trial, in violation of due process of law.

Question 2.

At his trial petitioner took the stand and asserted his innocence and has at all times thereafter asserted his innocence. The principal evidence against him were the confessions and statements taken from petitioner during the

55 hours following his arrest. Although petitioner testified that he was physically abused (B. E. 435, 441, 443) and threatened (B. E. 435, 436, 443), this was denied except for the county sheriff's admission that he turned petitioner's head around (B. E. 534, 380). The question in this Court is whether the uncontroverted testimony of the circumstances under which the confessions were obtained establishes that their admission in evidence was in violation of the due process clause of the Fourteenth Amendment. The following summary of the evidence is therefore based only on uncontroverted testimony.

Petitioner was arrested at 3:00 p.m. on Friday, April 9, 1954 (B. E. 565). At the time of his arrest he was physically and emotionally exhausted. He had not eaten for at least 24 hours, or since noon or soon thereafter on Thursday (B. E. 937, 478, 489 to 490), and had not slept for a longer period (B. E. 480). For 16 hours he had been trying to elude capture, and just before he was captured he was nearly drowned in the Niobrara River. He tried to swim the river, and in the words of the witness who effected his capture, the "strong currents" in the river "took him under" and he didn't reappear "for quite a while and I [fol. 124] thought he was gone for good, and then it has a back current there and he reappeared." He was swept under water for 75 feet, and then clung to a log (B. E. 947). His condition immediately after he was taken from the water was described by a state officer as: "he was soaked with water, and his general appearance was well, pretty run down, and his hair was all bushy, and one pants leg was missing, and he was pretty wild looking." (B. E. 733). A posse member described his condition at that time as "very poor" (B. E. 943), and a reporter who saw him soon thereafter said: "* * * he was dirty, and he looked like probably any man would that was being chased by a posse for 16 hours. * * * He looked bad, yes." (B. E. 579). For a photograph of petitioner in this condition, see E73.

Psychological pressure accompanying the arrest would further weaken the resistance of any man who was already in this run-down physical condition. A posse of 300 to 400

men had been combing the hills for him (B. E. 658). After petitioner had surrendered, but while he was still clinging to the log in the river, a member of the posse went out into the river to get him. This posse member testified that another member of the posse fired at petitioner and "probably would have shot me if somebody hadn't jammed or knocked his gun down, and he shot under both of us. * * * He was shooting right underneath the log where we were." (B. E. 940). As petitioner was taken from the river to a car there were crowds of armed men around him (B. E. 577, 981). They talked about shooting him and "some of them said we will give him what he gave the patrolman the night before." (B. E. 941). Those taking petitioner to the car had to warn other members of the posse "to handle their guns a little more careful." (B. E. 942).

Petitioner was taken immediately to Valentine and upon arrival at the courthouse was taken directly to the room where interrogation took place, without any opportunity for food, rest, or change of clothing (B. E. 384). There was a crowd of persons both inside and outside the courthouse (B. E. 537, and see E74, a photograph of petitioner being "hustled" into the courthouse through a crowd, and E73, a photograph of petitioner being brought upstairs in the courthouse through a throng of officers and onlookers). Thus even without petitioner's controverted allegation that the sheriff threatened him that "the crowd would take care [fol. 125] of me" if he didn't confess (B. E. 1001), the undisputed circumstances would have put any reasonable man in fear of mob action. They lend weight to petitioner's assertion that he only signed the first confession because "I felt that if I didn't sign it that, well, my life wasn't worth living another minute afterwards * * *." (B. E. 440).

Thus the stage was set for the interrogation of a man exhausted from being hunted in rough country for 16 hours by a large posse aided by aircraft, without food or sleep for more than 24 hours, chilled and groggy from having nearly drowned, and frightened from having been fired at after he had surrendered, from threats of lynching, and from the crowds around him at his capture and at the courthouse.

The questioning started immediately after petitioner arrived at the courthouse (B. E. 385; 384), which was about 3:30 p.m. (B.E. 384). Sometime after 9 p.m. he signed the first purported confession (B. E. 646; 410 to 412). During this period of about six hours he was kept continuously under questioning or in the office where the statement was being transcribed (B. E. 371; 377; 634). He was not allowed to eat anything until he had signed the statement (B. E. 540), and was not allowed to change from his wet clothes with the missing pant leg until 9:30 p.m. (B. E. 553). This first "confession" did not satisfy the officers, and after a respite of about 30 minutes duration (B. E. 440), during which he was given food, questioning was resumed at 10 p.m. Friday (B. E. 389) and continued until 3 a.m. Saturday morning (B. E. 565). Thus except for the 30 minute interval referred to, he was under continuous pressure to confess for 12 hours after his arrest (ibid.)

The investigation was resumed at 9 or 10 a.m. Saturday (B. E. 390). He was questioned at the scene of the crime for "4 or 5 hours" (B. E. 429), or at least until 2:30 (B. E. 429) or 3:00 p.m. (B. E. 567). That evening and into the early hours of Sunday he was interrogated "at great length" (B. E. 395). He was again interrogated Sunday morning (B. E. 393), and on Sunday "afternoon and evening" (B. E. 330) was turned over to South Dakota and federal officials for questioning about crimes allegedly committed the night before the homicide. These officers took another statement from petitioner between 6:00 and 10:00 p.m. Sunday evening (B. E. 331). Although there is little in the record as to what happened thereafter, evidently he was still being questioned on Monday, for on that day he [fol. 126] was brought into the county attorney's office to identify allegedly stolen goods found in his car (B. E. 722).

Petitioner was 20 years of age at the time, had a ninth grade education (B. E. 475), and had little experience in dealing with law enforcement officers. At the first interrogation an officer was assisted by a pharmacist (B. E. 604; 606) who had no connection with the law enforcement agen-

cies. The petitioner's size does not appear in the record, but he is described as "slightly built" (B. E. 603). Among those questioning him were men described as 6'4" tall and 212 lbs. (B. E. 569), 6'1" tall and 229 lbs. (B. E. 388 and 389, 6' tall and 175 lbs. (B. E. 388), another "fairly large man" (B. E. 603; 604) and a "big man" (B. E. 604). Petitioner is described as being smaller than the smallest of his interrogators, who was 5'7" tall and 160 lbs. (B. E. 604). An indication of the size of petitioner may be obtained by comparing his size with that of the officers surrounding him in photographs E53 and E73.

Although petitioner was arrested on Friday afternoon, he was not arraigned or given a preliminary hearing until some time Monday, April 12 (Tr. 8). A sheriff admitted that petitioner was held incommunicado and that no one was permitted to see him until "a couple of days" after the preliminary hearing (B. E. 550), and until this time he had no lawyer and his relatives were not permitted to see him (B. E. 452).

Petitioner was arrested without a warrant; the warrant which appears in the transcript is dated three days after he had been taken into custody (Tr. 6). In Nebraska detention following arrest without a warrant is legal only until a legal warrant can be obtained, Neb. Rev. Stats. § 29-401 (Reissue 1948), which in this case could have been done immediately. Once this warrant is issued, the defendant must be brought before a magistrate "forthwith," Neb. Rev. Stats. § 29 406, (Reissue 1948). During the detention in this case, from 3 p.m. Friday until some time Monday, petitioner was continuously confined in the courthouse at Valentine, and the arraignment and preliminary hearing could presumably have been held any time. In the absence of evidence demonstrating the necessity of such a delay, the delay here is unreasonable as a matter of law.

The judgment of the Supreme Court of Nebraska of June [fol. 127] 30, 1956 sustaining the use of all these confessions obtained under the foregoing circumstances raises a serious question of due process which ought to be settled by this Court. Whether the actions of the law enforcement

officers in detaining petitioner illegally for prolonged questioning are sufficiently serious to invalidate the use of the confessions under the due process clause may be open to dispute. Compare Ashcraft vs. Tennessee, 332 U. S. 143 (1944) with Stein vs. New York, 346 U. S. 156 (1953). In this case, however, there was a factor not present in the confession cases previously decided by this court. Petitioner's resistance was worn away by the cumulative effect of the actions of the officers and the circumstances preceding and surrounding his arrest. When petitioner was arrested, he was in no condition to be questioned, let alone being subject to a prolonged ordeal. The "circumstances surrounding the confession" which are to be reviewed, Leyra vs. Denno, 347 U. S. 556, 558 (1954), must include the physical, emotional and mental condition of the defendant at the time of the arrest; this is essential in order to apply the test of Stein vs. New York, supra at 158, that "the limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing." It follows that where a defendant's "power of resistance has already been virtually destroyed by physical exhaustion, near-drowning and threats of mob violence before and during arrest, relatively little pressure to confess after he is in custody may be sufficient to accomplish extortion of an involuntary confession. This question, however, has never been determined. It is squarely posed by this case and its resolution is important for the administration of justice.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE D. O'SULLIVAN, SR.,
278 Aquila Court Building,
Omaha 2, Nebraska.

JAMES A. LAKE, SR.,
4600 Bryan Circle,
Lincoln 6, Nebraska,
Counsel for Petitioner.

[fol. 128]

Of Counsel:

Arthur Lazarus, Jr.,
Richard Schifter,
Association on American Indian
Affairs
1700 K Street, N. W.
Washington 6, D. C.

[fol. 129] Writ of Habeas Corpus.

(Filed in U. S. District Court Jan. 7, 1957.)

In the United States District Court for the District of Nebraska.

Loyd Carroll Grandsinger, Petitioner,
No. 0265. vs. Civil.
Joseph B. Bovey, Warden, Nebraska State Penitentiary,
Respondent.

The President of the United States to Joseph B. Bovey, Warden, Nebraska State Penitentiary—Greeting:

You are hereby commanded, that the body of Loyd Carroll Grandsinger, by you restrained of his liberty, as it is said, detained by whatever name the said Loyd Carroll Grandsinger may be detained, together with the time and cause of his being taken and detained, you have before the Honorable John W. Delehant, Chief Judge of the United States District Court for the District of Nebraska, at the United States District Court Room in the Federal Court House in the City of Lincoln, Nebraska, at 9:30 o'clock in the forenoon of the 10th day of January, 1957, so as to do and receive what shall then and there be adjudged concerning the said Loyd Carroll Grandsinger, and have you then and there this writ.

Witness, the Honorable John W. Delehant, Chief Judge, United States District Court for the District of Nebraska, at Lincoln, Nebraska, this 7th day of January, 1957.

(Seal)

MARY A. MULLEN,
Clerk, United States District Court.
By /s/ E. B. Panter,
Deputy Clerk.

The foregoing writ is hereby allowed and service of it forthwith upon the respondent is directed this 7th day of January, 1957.

/s/ JOHN W. DELEHANT,
Chief Judge, United States District Court.

Seal
U. S. Dist. Court
Dist. of Nebraska

A true copy.

Attest:

MARY A. MULLEN,
Clerk.
By E. B. Panter,
Deputy.

[fol. 130] Return to Writ of Habeas Corpus.

(Filed in U. S. District Court Jan. 10, 1957.)

To the Honorable John W. Delehant, Chief Judge, United States District Court for the District of Nebraska:

Comes now the respondent in the above-captioned action, upon whom has been served a writ of habeas corpus for the production of Loyd Carroll Grandsinger, and making return to the said writ respectfully shows to the court that the petitioner is in the custody of the respondent, as War-

den of the Nebraska State Penitentiary, upon a conviction in the District Court of Cherry County, Nebraska, in which on June 16, 1954, the jury returned a verdict of guilty of murder in the first degree and fixed the penalty at death, and for further showing to this court, the respondent hereby incorporates herein by reference and makes a part hereof, paragraphs 1 to 27 inclusive of the respondent's return to the order to show cause filed in these proceedings.

In obedience, however, to the said writ of habeas corpus the respondent herewith produces before the court the body of Loyd Carroll Grandsinger, and for the reasons hereinbefore set forth respectfully prays the court to discharge and dissolve the said writ.

JOSEPH B. BOVEY, Warden,
Nebraska State Penitentiary,
Respondent.

State of Nebraska,
Lancaster County—ss.:

Joseph B. Bovey, being first duly sworn, on oath deposes [fol. 131] and says that he is the Warden of the Nebraska State Penitentiary and respondent in the above-entitled matter; that he has read the above and foregoing Return to Writ of Habeas Corpus and that the facts and statements therein contained are true as he verily believes.

.....

Subscribed and sworn to before me this.....day of January, 1957.

.....
Notary Public.

Acknowledgment of Service.

Service of the above Return to Writ of Habeas Corpus and receipt of two copies thereof acknowledged this 10th day of January, 1957.

.....
Attorney for Petitioner.

[fol. 132] (Memorandum Opinion of U. S. District Court)

Filed with me this 27th day of June, 1957.

/s/ JOHN W. DELEHANT,
Judge, United States District Court.
(Retired, serving by assignment)

In the United States District Court for the District of Nebraska.

Loyd Carroll Grandsinger, Petitioner,
No. 0265. vs. Civil.
Joseph B. Bovey, Warden, Nebraska State Penitentiary, Respondent.

Appearances:

For petitioner, Messrs. Eugene D. O'Sullivan, Sr., of Omaha, Nebraska, and Charles H. Flansburg, of Lincoln, Nebraska;

For respondent, Messrs. Clarence S. Beck, Attorney General, and Ralph D. Nelson, Assistant Attorney General, of Nebraska, of Lincoln, Nebraska.

Delehant, D. J. (Retired, serving by assignment)

Loyd Carroll Grandsinger, who will usually be referred to herein as "petitioner", is confined in Nebraska State Penitentiary, of which Joseph B. Bovey is the duly appointed warden, preliminary to the proposed and contemplated execution of a sentence of death by electrocution, imposed upon petitioner by a judgment of the District Court of Cherry County, Nebraska after the return of a verdict finding him to be guilty of a charge of murder in the first degree. Joseph B. Bovey will generally be designated as "respondent".

By leave of court, and after the presentation of an affidavit of poverty, petitioner filed, in forma pauperis, in this court and cause his application for writ of habeas corpus, along with a motion for appointment of counsel, and a motion for a stay of the execution of the sentence theretofore pronounced against him. The court, thereupon, entered orders, a) staying until the final determination of this proceeding the execution of the judgment and sentence

of death, b) appointing the attorneys above identified as his [fol. 133] counsel for the purposes of this proceeding[1], and c) ordering the respondent to show cause, within a period of time then fixed, why a writ of habeas corpus should not be issued, and granting to the petitioner leave to serve and file a response to such showing of cause. Respondent having served and filed a return to such order to show cause, and petitioner having served and filed a showing counter thereto, the court, upon due consideration of the record thus made, issued a writ of habeas corpus, to which respondent made timely return, in which he reiterated through incorporation by reference the allegations of his showing of cause. With the approval of counsel as to time, hearing was had upon the issues thus made; and, upon separate motions of the parties, further and supplemental hearing was had still later. Briefs and oral arguments of counsel have been submitted and considered, and the case is ready for final ruling by this court.

Two broad questions are encountered upon the submission. One is whether the jurisdiction of this court is properly invoked. And its answer depends upon petitioner's exhaustion of such remedies as are available to him under the law and in the courts of Nebraska. The other is whether, if jurisdiction be affirmed, petitioner has made out in his pleadings and by his proofs a case entitling him to the relief for which he prays. That question has to be determined with due regard to the several grounds of invalidity by him urged against his conviction and sentence and the evidence relevant to those grounds.

It seems appropriate that the issues and the pertinent facts and the court's final ruling should be set out separately and distinctly, first upon the jurisdictional issue, second

[1] The petitioner had expressly requested the appointment of Mr. O'Sullivan as an attorney in his behalf and, without the expression of a personal preference, of another attorney to assist him. Ordinarily, this court declines to appoint as counsel for persons requesting appointment of attorneys any member of the bar for whose appointment request has been directly made. Without discussion, it may sufficiently be said that the honoring of such nominations is calculated to expose both the court and counsel to obvious embarrassments. But in this instance, as the records disclosed and the court was aware, Mr. O'Sullivan had already rendered substantial professional service for petitioner through the procurement of persons interested in petitioner's plight. His appointment, therefore, appeared to be peculiarly appropriate. And Mr. Flansburg was selected by the court upon its own motion to participate in this proceeding in association with Mr. O'Sullivan.

ly upon the merits of petitioner's claim. That sequence is observed in this announcement. Primarily, [therefire], the factual or historical setting in which the issue of the exhaustion of state remedies arises will be recalled. It will [fol. 134] not, however, be the purpose of the court to repeat in detail findings pertinent to that issue which are also significant upon the main problem of the petitioner's claim of invalidity in his conviction and sentence.

The "judgment and sentence" was made and given in and by the District Court of Cherry County, Nebraska on June 16, 1954 after the return earlier on that date of a verdict of a jury finding the petitioner to be guilty of murder in the first degree as charged in the information on which he had been tried and fixing the penalty at death[2], and after the filing and overruling, also on the day of the return of the verdict, of a motion for a new trial. The petitioner, thereafter, made timely filing of a petition in error and perfected an appeal from the judgment and sentence to the Supreme Court of Nebraska. That court affirmed the judgment and sentence of the trial court on December 16, 1955. (see Grandsinger vs. State, 161 Neb. 419). It is obvious, from an examination of the opinion just cited, that it did not strictly examine or rule judicially upon, either phase of the presently asserted grounds of invalidity of petitioner's conviction and sentence, vide infra. Until the announcement of that ruling by the state's Supreme Court and for some time thereafter, vide infra, the alleged grounds of such invalidity had not been clearly and explicitly presented to and urged upon that court. The petition in error upon which the ruling just identified was made had been filed by petitioner on July 15, 1954. Like the motion for new trial already adverted to, it assigned as a specification of error in the trial "error in the admission of evidence for the state". That specification in the motion for new trial is in the exact language of the quotation just made. It is set out thus in the petition in error: "The trial court erred in admitting on behalf of the state incompetent, irrelevant and immaterial and prejudicial evidence over the objection of the petitioner." In his brief as

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[2] In the state courts of Nebraska the determination of the sentence, as between death and life imprisonment, rests with the jury upon its finding and return of a verdict of guilty of murder in the first degree. Section 28-401 R.S. Neb., 1943, Reissue of 1956.

[fol. 135] petitioner in error in the Supreme Court of Nebraska, petitioner included within his statement of facts some assertions that question the freedom and voluntariness of statements, written and oral, on his part, touching the offense charged against him which had been received in evidence. But he did not in such brief poise a real appellate contention or argument upon that point. In relation to that manner of submission of the appeal, it is fairly obvious that, despite certain language in its opinion,[3] referring to his admissions received in evidence upon the murder trial, the state Supreme Court appears not to have considered the issue of freedom and voluntariness to have tendered with a measure of clarity and directness adequate to require close examination by the reviewing court. And no reference to the subject appears among the syllabi or headnotes of the opinion in the official report.[4]

On January 5, 1956 petitioner filed a motion for rehearing in the state's Supreme Court of which a copy is included with a supporting brief in a filing made in that court apparently on January 14, 1956 concurrently with the argument upon the motion. The motion for rehearing was overruled without opinion by an order entered and dated on February 11, 1956. In that motion for rehearing no effort was made to raise or tender to the court either of the grounds relied upon by the petitioner in this proceeding.[5]

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[3] Cited and quoted in detail in the later portion of this memorandum which deals with the merits of petitioner's assertion of facts on which he relies to support the invalidity of his conviction.

[4] At this point, however, it should be noted that in its editorial treatment of the same opinion (see 73 N.W.(2) 632) West Publishing Company, with supporting reference to the paragraph of the opinion later underlined herein, has included as its first numbered headnote the declaration that: "In murder prosecution, whether defendant's confessions were voluntarily given and whether he made several statements contained therein were matters for determination by jury under appropriate instructions."

[5] The statement prompting this note is made understandingly. Although the motion for rehearing asserts error in permitting the testimony of James F. Shoemaker to go to the jury, the testimony to which it refers is clearly limited by the motion and its supporting brief to "evidence of other crimes than that with which the accused is charged." And that is true despite the fact that the testimony thus challenged was oriented to a conversation in which Shoemaker participated, out of which emerged a statement constituting one of the so-called "confessions" of the petitioner. The motion for rehearing does not go to the length of challenging the admission of the "confession" itself, but narrowly attacks only an incidental feature of Shoemaker's evidence by way of support of the "confession".

A mandate of affirmance and a death warrant having meanwhile been made and given by the Supreme Court of Nebraska, petitioner, on March 8, 1956 filed in that court and in the proceeding pending therein for review of his conviction a motion for recall of the mandate and stay of execution of the judgment and an application for stay pending an effort by petitioner to obtain a writ of certiorari from the Supreme Court of the United States for the review by the latter court of the affirmance by Nebraska's [fol. 136] Supreme Court of the conviction of and sentence upon petitioner. In that motion two of the questions which petitioner specified for raising by petition for writ of certiorari are thus set out:

"(f) Was plaintiff in error compelled to give evidence against himself in violation of the constitutional privilege against self incrimination, or, was plaintiff in error denied his constitutional right to a fair and impartial trial, or, was plaintiff in error denied due process of law, by the admission by the District Court of Cherry County, Nebraska, of evidence of purported confessions and statements of plaintiff in error which the record showed were extracted from the plaintiff in error by means of threats, physical and mental duress, physical and mental exhaustion, and physical and mental torture?

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"(i) Was plaintiff in error denied his constitutional right to adequate representation by counsel through actions of his counsel prejudicial to his case?"

The motion in this paragraph identified was signed by petitioner in his own name, and not in his behalf by Mr. Charles A. Fisher, his then surviving attorney.[6] There is nothing in the motion to indicate that Mr. Fisher had any part in its preparation. Actually, an affidavit in the record declares that he had none and knew nothing of the motion's contents until after its filing. But for want of a proper

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[6] For a recital of the history of petitioner's representation by counsel, see the factual findings, infra, incident to the merits of this proceeding. It is regarded as more directly significant there than in this preliminary jurisdictional inquiry.

submission of that issue, and because it is not dispositively significant, no finding is now expressly made upon it.

On March 17, 1956 the Nebraska Supreme Court entered orders recalling its mandate and staying further proceedings until May 18, 1956.

Under date of April 27, 1956, but with filing as of April 30, 1956, petitioner filed in the Supreme Court of Nebraska [fol. 137] written notice that he had dismissed Mr. Fisher as his attorney on March 13, 1956, and on April 25, 1956 had retained Mr. O'Sullivan as his attorney; and on April 28, 1956, Mr. O'Sullivan signed an entry of appearance in petitioner's behalf, which was also filed on April 30, 1956.

Thereafter, and on June 18, 1956, through Mr. O'Sullivan as his attorney, petitioner filed in the Supreme Court of Nebraska a motion for leave of court to file an amended and supplemental motion for rehearing and a brief for rehearing, along with a copy of the proposed amended motion and brief. On that day also, the Supreme Court of Nebraska entered an order granting the motion and setting the amended and supplemental motion for rehearing for hearing before that court on June 23, 1956. Raised and tendered in and by the amended and supplemental motion for rehearing and brief were the following grounds for relief, as reflected in the motion itself:

"3. Due to the confessed criminal misconduct of Charles A. Fisher, his then chief counsel, plaintiff in error was denied effective representation of counsel which was and is in violation of his rights under Section 1 of the Fourteenthr Amendment to the Constitution of the United States, relating to deprivation 'of life, liberty, * * * without due process of law * * *.'

"4. The plaintiff in error was denied due process of law as guaranteed to him by said Section 1 of the Fourteenth Amendment of the Constitution of the United States in that the misconduct of defense counsel, the misconduct of the special prosecutor in forcing defense counsel to confess to a possible criminal act before the jury, the failure of the trial court to protect the rights of the plaintiff

in error, and the permeating incompetence of defense counsel, each and all of which denied plaintiff a fair trial as contemplated by the Constitution of the United States as heretofore referred to.

"5. The alleged confessions of the plaintiff in error were obtained in violation of the due process of law clause aforementioned and their admission in evidence was and is in violation of the said due process clause of the Fourteenth Amendment of the United States Constitution aforementioned."

And the motion also tendered the following questions:

[fol. 138] "2. Did the confessed criminal and wrongful misconduct of defense counsel in tampering with the evidence and rendering it valueless create a conflict of interest between defense counsel and his client which denied plaintiff in error effective and unqualified representation by counsel?

"3. Did the claimed incompetence, fraud and misconduct of defense counsel, in a trial where the evidence was close, where defense counsel's misconduct was exploited by the special prosecutor to plaintiff in error's substantial prejudice, and where the trial court failed to protect the fundamental rights of the plaintiff in error, create an exceptional situation which deprived the plaintiff in error of a fair trial under the Fourteenth Amendment of the United States Constitution as heretofore claimed?

"4. Were the confessions, which were admitted in evidence by the trial court, obtained under such circumstances that their use by the State was contrary to the rights guaranteed to plaintiff in error by the Fourteenth Amendment of the United States Constitution heretofore referred to?"

Hearing was had on the amended and supplemental motion for rehearing on June 23, 1956, and it was denied without opinion by an order of the Supreme Court of Nebraska made and entered on June 30, 1956.

Stay of execution of the sentence having theretofore been granted by one of the justices of the Supreme Court of the

United States, petitioner, on July 9, 1956 filed in that court a petition for a writ of certiorari to review the foregoing action of the Supreme Court of Nebraska, in which petition were presented the following questions:

"1. Was petitioner, a defendant in a state capital case, denied due process under the Fourteenth Amendment to the United States Constitution:

(a) Where defense counsel was caught during the trial tampering with the evidence introduced in the case by the State, was forced to confess his criminal misconduct in open court before the jury, thereby debasing and disgracing himself and his much harried client, and thus placing himself in a situation in which his own interests in protecting his professional future were adverse to the duties he owed his client, and where this conflict of interest prevented him from giving petitioner effective and unqualified representation by counsel; and/or

(b) Where the exploitation of defense counsel's misconduct by the prosecutor and trial court, coupled with defense counsel's general incompetence, particularly in failing to make proper and adequate objections in preserving federal questions for review, and other misconduct of the [fol. 139] prosecutor and the failure of the trial court to protect petitioner's essential rights, deprived petitioner of a fair trial.

"2. Did the admission and use of petitioner's confessions constitute a denial of due process under the Fourteenth Amendment to the United States Constitution."

On October 22, 1956, the Supreme Court of the United States entered an order denying the foregoing petition for a writ of certiorari. Grandsinger v. Nebraska, 352 U.S. 880.

On October 29, 1956, the Supreme Court of Nebraska by an order fixed December 28, 1956 between the hours of 6:00 a.m. and 6:00 p.m. as the time for the execution of the sentence upon the petitioner and issued a death warrant accordingly.

Shortly before the time thus prescribed for the execution of the sentence petitioner in his own name filed herein the application for a writ of habeas corpus. While he acted in that behalf in his own name, it should not be supposed that his application is to be regarded as the work of an illiterate litigant. He manifestly had the assistance of a person or of persons skilled in the law in its preparation. That will not, indeed can not, be denied. The grounds for relief set out in the application are these:

"The above described judgment and sentence was and is null and void because during the trial a conflict of interest arose which destroyed petitioner's trial counsel's ability effectively to represent petitioner. Due to this conflict of interest petitioner was deprived of the effective and unqualified representation of counsel which the Fourteenth Amendment to the United States Constitution commands to be afforded to a defendant in a state capital case.

The deprivation of the right of counsel arose for the following reasons:

"(a) Petitioner alleges that during the course of his trial for first degree murder in the District Court of Cherry County, Nebraska, the State of Nebraska introduced into evidence a belt allegedly worn by the victim; that said belt allegedly contained a hole which the State of Nebraska contended was made by the fatal bullet; that the State of Nebraska sought by expert testimony to prove that the hole could have been made only by a .22 caliber size bullet; that such evidence was important to the State's case; and that the Court impressed the importance of the Exhibit upon the jury and warned them merely to examine but not to probe at the hole.

[fol. 140] "(b) Petitioner further alleges that on the tenth day of the trial, when the proceedings had reached the crucial stage at which final arguments of counsel were to be made to the jury, petitioner's Chief Defense Counsel was caught in the act of attempting to enlarge the size of the hole in the said belt by pushing a tapered dowel stick

through it, said misconduct occuring (sic) after the exhibits had been brought into the courtroom but before court had actually convened.

"(c) Petitioner further alleges that his counsel caused or permitted counsel's gross misconduct to be brought to the jury's attention, as shown by the following proceedings which took place when the court convened a few moments later:

By Mr. Clarke (special prosecutor):

Before we proceed with the arguments, Your Honor, there is a matter that has been taken up with, Your Honor, which we wish to get into the record.

The Court: Very well.

Mr. Clarke: We wish the record to show that counsel for the defendant, is willing that it shall show, that this morning (sic) in this court room, after the court reporter had brought all the exhibits in the case out and laid them on the reporter's desk, Mr. Fisher, one of the counsel for the defendant, while he was examining Exhibit No. 10, being the leather pants belt heretofore identified as the belt of Marvin Hansen, and that at that time he took a dowel, being one of the wooden dowels on the reporter's desk, and being either the same or one exactly like the one I am holding in my hand, which I will have to have marked as an exhibit, and pushed it violently—

Mr. Fisher: (Interrupting) I didn't violently push it—

Mr. Clarke: (Interrupting) pushed it through the hole in the belt hard enough so that it materially enlarged the size of the hole to an extent which cannot now be determined and that the belt, Exhibit No. 10, is not now in the same condition as it was when it was offered in evidence and received in evidence, and that the hole is now materially larger than it was before Mr. Fisher did that.

(Mark this dowel as an exhibit, please.)

(The wooden dowel referred to was marked as Exhibit No. 75.)

The Court: Mr. Fisher, as I understand it you have told counsel that you did that?

Mr. Fisher: Yes.

The Court: You recognize that the hole is larger?

Mr. Fisher: Yes.

"(d) Petitioner further alleges that his counsel's confessed willingness to have this conduct brought to the jury's [fol. 141] attention was a flagrant violation of the duties counsel owed to petitioner; that petitioner's defense was and is that he is innocent, and that at the time this misconduct took place the jury was going to have to resolve conflicting evidence and, in the event of a guilty verdict, determine whether or not to impose the death penalty; that defense counsel must have known how prejudicial it would be to petitioner's rights to have the jury diverted from the grave and difficult duties it faced to the gross misconduct of counsel; but that defense counsel nonetheless made no effort to protect petitioner's rights.

"(e) Petitioner further alleges that his counsel was diverted from his duties to use all honorable means to present facts and arguments in behalf of petitioner and to abide by the Canons of Professionel Ethics of the Legal Profession because of a conflict of interest created when his misconduct was discovered and he therefore faced the prospect of criminal punishment, disbarment or other disciplinary action, or economic loss; and that counsel resolved this conflict of interest by cooperating with court and prosecutor in order to protect himself, in utter disregard of his duties to petitioner, whose own life was then in jeopardy.

"(f) Petitioner further alleges that the foregoing acts of misconduct were done without petitioner's knowledge at any time and without his consent or authorization, express or implied.

"The above described judgment and sentence was and is void for the reason that purported confessions of peti-

tioner were received in evidence and used to influence the jury notwithstanding the fact that the purported confessions were coerced and their use violated petitioner's rights under the due process clause of the Fourteenth Amendment to the United States Constitution.

"These purported confessions were coerced and their admission in evidence was a violation of petitioner's constitutional rights for the following reasons:

"(1) Prior to the time petitioner was apprehended he was physically, emotionally and mentally exhausted, having gone without food for twenty-four hours and without sleep for a similar or longer period. Petitioner had nearly drowned and was in no condition to undergo a long and intensive period of questioning.

"(2) Petitioner was threatened, intimidated, and physically abused by officers of the state, Cherry County, and other members of the posse which captured him on Friday afternoon, April 9, 1954.

"(3) Petitioner was immediately taken to Valentine, Nebraska, for questioning and was frightened by a large, mob milling about the place of questioning.

"(4) On Friday evening, April 9, 1954, petitioner signed a purported confession after having been threatened, physically abused, and interrogated at great length by police officers.

[fol. 142] "(5) Petitioner at later times made other purported confessions which were used at the trial as a basis for the judgment and sentence of death now imposed upon petitioner. Petitioner alleges that these confessions were false, and were the result of further physical disabuse, threats, intimidations, and long and intensive questioning lasting for many hours, which made petitioner confess out of fear for his life.

"(6) Petitioner alleges that he was held incommunicado from the time of his arrest on Friday afternoon, April 9, 1954, until at least Wednesday, April 14, 1954, and that

despite attempts by friends, relatives and others to contact petitioner, he, petitioner, was not permitted to secure legal counsel or to consult with and obtain the advise (sic) of friends and relatives.

"(7) Petitioner further alleges that he was not promptly given a preliminary hearing as required by the law of the State of Nebraska."

In the countershowing here of petitioner replying to respondent's return to the order to show cause why the writ should not be issued, petitioner's court appointed counsel amplified and particularized the grounds for relief asserted by him in his application to this court. That was done in language which, though not copied at length, is summarized by the writer hereof in a footnote.[7]

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[7] Without any attempt at verbal exactness, the following is a summary, paragraph by paragraph, of the material set out by petitioner in the countershowing to which reference has been made in the body of the memorandum.

1. Petitioner was apprehended by members of a posse during the afternoon of April 9, 1954. He was not afforded an early preliminary hearing as required by law. He was retained in custody and confined in jail many days before the filing of the complaint and before any preliminary hearing; during which period he was physically abused, threatened and placed in fear by officials of the county and state and held in jail without permission to confer or make contact with counsel, relatives or friends, and in that interval subjected to grueling interrogation and efforts by officials to extort a confession from him.

2. At the time of the filing of the complaint against petitioner and of his preliminary hearing, he was taken from jail to the county court without explanation of the proceedings to be had in that court and without assistance of counsel; and at the preliminary hearing the charges against him were read in untelligible technical language, and, at the suggestion of the county attorney, petitioner pleaded not guilty thereto. Despite any record of the proceedings indicative to the contrary, petitioner did not know of, or knowingly waive, any right to preliminary hearing.

3. During petitioner's trial and at a point therein immediately prior to oral argument, Mr. Fisher, chief defense counsel, committed the acts of misconduct charged against him in petitioner's application for a writ herein, vide aliter, and after the ensuing argument the case was submitted to the jury which returned its verdict of guilty and fixing the death penalty, early on the following morning. Later on the day of the return of verdict, Mr. Fisher prepared written motion for a new trial, caused it to be filed with the clerk of the court, and such motion was overruled, also on the day of return of verdict; whereupon and immediately, the trial court pronounced sentence and fixed date of execution. Such motion for a new trial did not assign, as one of its grounds, the misconduct of Mr. Fisher and the petitioner's resultant deprivation of the effective assistance of counsel, and did not assign, as one of its grounds, the denial of due process in the trial resulting from the admission in evidence of the so-

Petitioner's status as "a person in custody pursuant to the judgment of a state court" would seem sufficiently to have been emphasized. In view of it, Title 28 U.S.C., Section 2254 has to be regarded. It follows:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the

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called confessions, notwithstanding their alleged infirmities. Actually, the motion for new trial was prepared and filed hastily as a result of prearrangement between counsel for petitioner and the special prosecutor for the state to serve the convenience of counsel residing at a distance from the place of trial and save Cherry County and the State of Nebraska certain expenses, but in disregard of petitioner's rights and interests. The conduct of Mr. Fisher thus reflected deprived petitioner of a fair and impartial consideration of any proper motion for a new trial, and the protection of his constitutional rights and establishes a conflict of interest between petitioner and his counsel which was by his counsel resolved in counsel's favor.

4. The petition in error prepared by Mr. Fisher did not raise the constitutional questions of deprivation of counsel resulting from counsel's misconduct, and the denial of due process arising out of the use of the admissions or confessions, or either of such issues. Due to the death of William C. Heelan, one of petitioner's attorneys, shortly after the Cherry County trial and before the appeal was presented to the Supreme Court of Nebraska, petitioner, in consequence of Mr. Fisher's conduct, was, therefore, actually deprived of all assistance of counsel.

5. Because of Mr. Fisher's failure to raise such constitutional questions, the decision of the Supreme Court of Nebraska did not discuss or dispose of such questions. Nor were they raised by Mr. Fisher in the original motion for rehearing filed in the State's Supreme Court or disposed of by that court in its ruling on the motion.

6. Petitioner's motion for recall of mandate, vide supra, was not prepared by Mr. Fisher.

7. The motion for leave to file amended and supplemental motion for rehearing and brief thereon, filed on June 12, 1956 by Mr. O'Sullivan, raised for the first time the constitutional questions and issues presented in the application to this court for writ of habeas corpus.

8. The constitutional questions raised in the petition for writ in this cause were fully presented to the Supreme Court of the United States in petitioner's petition for writ of certiorari, and that petition was denied by the Supreme Court of the United States.

meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

Essentially, that section, newly enacted in 1948, translated into formal legislation and somewhat clarified and amplified a procedural requirement that had emerged from many reported judicial opinions, of which *Ex parte Hawk* [fol. 143] 321 U.S. 114 is a fair reflection and summary.

By virtue of the cited statute, it appears that a petitioner for a writ to procure his release from confinement under a state judgment is absolved from the necessity of resort to state remedies if "it appears. . . . that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights" of the petitioner. The question at once arises, therefore, whether either of those supposed inadequacies of state procedure appears. Its answer is not unmistakably clear when one examines the course of Nebraska authority. The per curiam opinion in Ex parte Hawk, supra, though with something less than adequate assurance and analysis, indicates that until its date, the Supreme Court of the United States thought that, in Nebraska's procedural system, one might seek relief against a void sentence by a state court through a writ of habeas corpus or by quest of a writ of error coram nobis, depending upon the appropriateness of those remedies severally to the history of his particular case. But subsequent phases of Hawk's efforts to secure his release from imprisonment[8] served somewhat to obscure the certainty of Ex parte Hawk, supra. Later in 1944, in Hawk vs. Olson, 145 Neb. 306, the Supreme Court of Nebraska affirmed a judgment of the District Court of Lancaster County, Nebraska summarily denying a petition of Hawk for a writ of habeas corpus. In the course of its opinion it undertook to distinguish between the availability of the writ of error coram nobis and that of habeas corpus; and, doing so, used this language:

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[8] Which persisted until death eventually overtook Hawk and found him in the enjoyment of a precarious, and perhaps temporary, discharge from custody. Hawk vs. Hann (D.C.Neb.) 103 F. Supp. 138; Hann vs. Hawk, (8 Cir.) 205 F(2) 839 and 207 F(2) 82.

"The writ of error coram nobis has been recognized in this state. Carlsen vs. State, supra" (i.e. 129 Neb. 84). "The object of the writ is to bring into the record, before the court that rendered the judgment, facts which were unknown to the defendant at the time of the trial through no lack of reasonable diligence on his part, which, if known at the time of the trial, would have resulted in a different judgment. As stated in Carlsen vs. State, supra: . . . '. . . the writ of habeas corpus does not afford a corrective judicial process to remedy an error of fact, at the trial, without which a conviction would not have resulted. . . . [fol. 144] Habeas corpus is not a proper remedy to release one from prison who has been wrongfully convicted.'"

Reviewing that ruling upon certiorari the Supreme Court of the United States in Hawk vs. Olson, 326 U. S. 271, reversed it and remanded the case for the purpose of trial upon the merits of Hawk's claim that he had been denied the effective assistance of counsel. In its opinion, the court, speaking through Mr. Justice Reed, said, among other things:

"As the Supreme Court of Nebraska considered the motion for continuance on the merits, no question of state procedure for the reexamination of criminal convictions arises. As to the issue on the motion for continuance, our duty requires us to determine only whether or not the denial under the facts alleged violates due process. We think there was an allegation that no effective assistance of counsel was furnished in the critical time between the plea of not guilty and the calling of the jury. Continuance may or may not have been useful to the accused, but the importance of the assistance of counsel in a serious criminal charge after arraignment is too large to permit speculation on its effect. We hold that denial of opportunity to consult with counsel on any material step after indictment or similar charge and arraignment violates the Fourteenth Amendment.

"Petitioner states a good cause of action when he alleges facts which support his contention that through denial of asserted constitutional rights he has not had the kind of

trial in a state court which the due process clause of the Fourteenth Amendment requires. This, of course, does not mean that uncontradicted evidence of a witness must be accepted as true on the hearing. Credibility is for the trier of the facts. The evidence may show that the charge was served upon petitioner well in advance of the trial (see note 5, supra) and that he had ample opportunity to consult with counsel and secure any needed witnesses. He may have intelligently waived his constitutional rights. Adams vs. U. S. ex rel. McCann, 317 U. S. 269, 275.

"Petitioner carries the burden in a collateral attack on a judgment. He must prove his allegations but he is entitled to an opportunity."

But when the case was returned to the Nebraska Supreme Court with a mandate of reversal, that court refused to enter judgment on the mandate of the Supreme Court of the United States, Hawk vs. Olson, 146 Neb. 875. In its justification of that patently unusual course it said in part:

"We think the Supreme Court of the United States overlooked the full import of our opinion, for it said: 'When the corrective process is provided by the state, but error, in relation to the federal question of constitutional violation, creeps into the record, we have the responsibility to review the state proceedings.' (Emphasis supplied). 'As [fol. 145] the Supreme Court of Nebraska considered the motion for continuance on the merits, no question of state procedure for the reexamination of criminal convictions arises.' (Emphasis supplied). The Supreme Court of the United States thus, as a premise for its jurisdiction to review and for its decision, assumed a proposition of state law contrary to our holding in the case."

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"A 'question of state procedure for the reexamination of criminal convictions' did arise and was determined by us. That question remains in this case and is here now. A habeas corpus proceeding is not a 'corrective judicial process' in which the questions which petitioner seeks to present may be determined in the courts of this state. Although it holds that habeas corpus is a process available

in the federal courts to redress the violation of the federal constitutional right, the Supreme Court of the United States does not discuss nor pass upon the nature of the remedy available in the courts of Nebraska.

"It is not for us to say what constitutes a violation of the due process of law clauses of the Federal Constitution when the Supreme Court of the United States has spoken on that subject with relation to the question presented. Neither is it for us to say what issues may be justiciable in an application for a writ of habeas corpus when that writ is sought in the federal courts. But those are not and were not the issues presented and determined by us.

"The issue here now is the same as it was when the case was initially before us, and that is, what issues are justiciable in an application for a writ of habeas corpus in the courts of this state. That question is for the courts of this state to decide. We have the undoubted right to decide upon our own jurisdiction and the jurisdiction of the courts of this state to which our appellate power extends. Davis vs. Packard, 8 Peters 312; Johnson vs. Radio Station WOW, ante p. 429, 19 N.W. 2d 853. The Supreme Court of the United States has said: '* * * the State may supply such corrective process as to it seems proper.' Frank vs. Mangum, 237 U. S. 309, 335, 59 L. Ed. 969, 983 35 S. Ct. 582, 590.

"In Jackson vs. Olson, No. 32012, released concurrently herewith, post p. 885, 22 N. W. 2d 124, we have reexamined and restated the rules governing the use of the writ of habeas corpus in this state and pointed out that our holdings are in accord with the decisions of the Supreme Court of the United States there cited. Those rules are: To release a person from a sentence of imprisonment by habeas corpus, it must appear that the sentence was absolutely void. Habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense, had jurisdiction of the person of the defendant, and the sentence was within the power of the court to impose. Such

a judgment is not void. Habeas corpus cannot be used as a substitute for a writ of error. Habeas corpus is a collateral and not a direct proceeding when regarded as a means of attack upon a judgment sentencing a defendant. The regularity of the proceedings leading up to a sentence in a criminal case cannot be inquired into on an ap- [fol. 146] plication for a writ of habeas corpus, that matter being assailable only in a direct proceeding. When the judgment is regular upon its face and was given in an action where the court had jurisdiction of the offense and of the person of the defendant, extrinsic evidence is not admissible to show its invalidity.

"Under those rules the issue, which the Supreme Court of the United States said petitioner presents, cannot be determined in a habeas corpus proceeding in this courts of this state.

* * * * * * *

"In full accord with our decisions we are required to hold that petitioner's issues which the Supreme Court of the United States said he is entitled to have an opportunity to prove are issues which are not justiciable in a habeas corpus proceeding in this state."

See also Jackson vs. Olson, 146 Neb. 885, referred to in the companion Hawk opinion; and Swanson vs. Jones, 151 Neb. 767, both essentially supporting the view advanced in the Hawk opinion from which quotation has just been offered.

Hawk, thereafter, undertook to procure his release through quest of a writ of error coram nobis but without success. Hawk vs. State of Nebraska, 151 Neb. 717, (Cert. den. 339 U. S. 923). It is to be noted, however, that on that occasion, he obtained, in the trial court, a hearing upon the merits of his claim, and, in the state's Supreme Court, a review of the decision below upon the merits. He failed not because the remedy pursued was wholly unavailable but because, as both of the state courts found, the operative facts did not support his claim, including the element of it having to do with the alleged denial of the effective assistance of counsel. In the state Supreme

Court's opinion emphasis was placed upon Hawk's knowledge, or readily available opportunity with reasonable diligence to have knowledge, at the time of his initial trial, of the wrongs of which he was complaining in the proceeding for writ of error coram nobis. And it also expanded upon Hawk's supposed competence to represent himself in criminal litigation.[9] The following excerpt from the opinion cited in this paragraph is instructive upon the state court's appraisal of the reach of its writ of error coram nobis:

[fol. 147] "The writ of error is brought for a supposed error in law apparent on the record, and takes the case to a higher tribunal where the question is to be decided and the judgment, sentence, or decree is to be affirmed, modified, or reversed, while the writ of error coram nobis is brought for an alleged error in fact not appearing on the record, and lies to the same court in order that it may correct the error, which it is presumed would not have been committed had the fact in the first instance been brought to its notice. See 3 Am. Jur., Appeal and Error, § 1276, p. 766.

"The common-law writ of error coram nobis is not a substitute for the statutory remedy of a writ of error under the Nebraska criminal procedure. See, Carlsen vs. State, 129 Neb. 84, 261 N. W. 339, certiorari denied, 293 U. S. 607, 55 St. Ct. 123, 79 L. Ed. 698; Newcomb vs. State, 129 Neb. 69, 261, N. W. 348; Swanson vs. State, 148 Neb. 155, 26 N. W. 2d 595, certiorari denied, 331 U. S. 863, 67 S. Ct. 1759, 91 L. Ed. 1869.

"The purpose of the writ of error coram nobis should be noted. The writ of error coram nobis is to enable the court to recall some adjudication, made while some fact existed which, if before the court, would have prevented rendition of the judgment, and which, through no fault of the party, was not presented. See Swanson vs. State, supra.

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[9] In that position the writer of the opinion was quite unrealistic. Actually, Hawk was an ignorant old man and the victim of an unreasoning obstinacy that was rooted in and nourished by his very ignorance. The observation now made is based upon a close familiaritiy with the man himself and with the pleadings in most of the very cases upon which reliance seems to be placed in support of the thesis of his competency. They unmistakably betrayed their author's incompetency.

"The common-law writ of error coram nobis to bring into the record facts which were unknown to the defendant at the time of trial through no lack of reasonable diligence on his part, which, if known at the time of the trial, would have resulted in a different judgment, exists in this state under section 49-101, Comp. St. 1929, now section 49-101, R. S. 1943. See Carlsen vs. State, supra.

"Where the facts alleged are known to the applicant before or during the progress of the trial, or could have been known by the exercise of reasonable diligence, the writ must be denied. See, Swanson vs. State, supra; Dobbs vs. State, 63 Kan. 321, 65 P. 658; 24 C.J.S., Criminal Law, § 1606 (6), p. 154."

Long examination of Nebraska's decisions within this area of the law, including, but not at all limited to, those already cited applications and limitations of the law, does not persuade this court that in the state's jurisprudence there is an absence of available state corrective process for the vindication of a position such as petitioner is now taking. It is true that the later Hawk opinions tend strongly to support the view that a proceeding in the state court for a writ of habeas corpus may not be resorted to in Nebraska's courts because of error or denial of due process [fol. 148] in the reception of an involuntary or coerced statement or confession made by one accused of crime, or even because of the denial of the federally guaranteed constitutional right to the effective assistance of counsel through the circumstances pleaded here, vide infra. But it does not appear that the issue of the denial of the effective assistance of counsel may not be raised in a proceeding for a writ of error coram nobis. That is especially true in this case in the light of the manner in which the asserted deprivation of such assistance arose and of the present petitioner's age and immaturity. Those factors seem clearly to distinguish it from Hawk's problem.

Nor is any circumstance known or believed to exist which renders any available process ineffective to protect the rights of the petitioner if properly asserted in the state courts. Upon that point, this court is satisfied that, under

all of the conditions that existed in petitioner's trial he would not, in a state court corrective proceeding, find himself barred from the full and fair consideration of his contention of the denial of the effective assistance of counsel by reason of his failure, in the crisis in which he unwittingly found himself at the most perilous moment of his trial for a capital offense, to repudiate his erring counsel and thereafter to assume his own defense.

The court, therefore, is persuaded that it must inquire whether there has been an exhaustion by petitioner of the remedies available to him under the laws and in the courts of Nebraska. That inquiry has been made and it is believed that it must be answered affirmatively. It has frankly to be acknowledged that the court's conclusion would be directly to the contrary but for Brown vs. Allen, 344 U. S. 443. Prior to the ruling in that case, this court had admittedly thought of the exhaustion of state remedies exclusively in terms of the so-called "collateral remedies." One might have been mistakenly led to that supposition by the lan- [fol. 149] guage of Ex parte Hawk, supra, although that opinion did not deal at all with the subject of direct proceedings for review of conviction but arose in a setting in which only collateral remedies were involved. But Brown vs. Allen, supra, seems conclusively to have settled the question.

That ruling affected three separate appeals from the affirmance of denials of petitions for writs of habeas corpus tendered by state prisoners to United States District Courts after they had pursued no corrective remedy other than an unsuccessful appeal to the state's Supreme Court from their original convictions and sentences and an unavailing application to the Supreme Court of the United States for a writ of certiorari to review the affirmance of such conviction. The procedural posture of each of the cases then before the Supreme Court of the United States was, therefore, identical with that of the present action. And, despite a wide variety of view upon other matters, as reflected in the opinions reported under the single citation, the court seems clearly to hold that, without the prosecution of any collateral proceeding whatsoever, the presenta-

tion of the issue relied upon for a writ of habeas corpus, in a direct appeal from conviction, followed by the unsuccessful effort to obtain review through certiorari, sufficiently exhausts state remedies to comply with Title 28 U.S.C., Section 2254.

In the body of the opinion by Mr. Justice Reed, it is said that:

". . . We conclude that all required procedure for state review of the convictions had been exhausted by petitioners in each case before they sought the writs of habeas corpus in the federal courts. In each case petitions for certiorari to this Court for direct review of the state judgments rendered by the highest court of the state in the face of the same federal issues now presented by habeas corpus had been denied.

"It is not necessary in such circumstances for the prisoner to ask the state for collateral relief, based on the same evidence and issues already decided by direct review with another petition for certiorari directed to this Court. It is to be noted that an applicant is barred unless he has 'exhausted the remedies available in the courts of the State . . . by any available procedure.' The legislative history [fol. 150] shows that this paragraph, in haec verba, was presented to the Congress with the recommendation of the Judicial Conference. The legislative history of 28 U.S.C. § 2254 has no discussion of the considerations which moved congressional enactment other than that contained in S. Rep. No. 1559. But see a similar clause § 2254 in H. R. 3214, 80th Cong., 1st Sess.; H. R. 3214, 80th Cong., 2d Sess.; S. Rep. No. 1559, 80th Cong., 2d Sess., p. 9; Report of the Judicial Conference of Senior Circuit Judges, 1947, pp. 17-20.

"The second paragraph of § 2254 has been construed by several courts of appeals. In Ekberg vs. McGee, 191 F. 2d 625, the Ninth Circuit refused to consider that the statute meant to deny a federal forum where state procedures were inexhaustible. The Third Circuit in Master vs. Baldi, 198 F. 2d 113, 116, held that the exhaustion of one of several

available alternative state remedies with this Court's denial of certiorari therefrom is all that is necessary. In Bacom vs. Sullivan, 181 F.2d 177, and Bacom vs. Sullivan, 194 F. 2d 166, the Fifth Circuit ruled that when a federal question had been presented to the state courts by at least one post-conviction procedure, certiorari on the same question having been once denied by this Court, there appeared a unique and extraordinary circumstance justifying federal examination under Darr vs. Burford, 339 U. S. 200.

"When, in April, 1948, Judge Maris presented the Judicial Conference draft of § 2254 to the Senate Judiciary Subcommittee, the language of the revision of 28 U.S.C., on which the hearings were being held, set out three bases for exercise of federal jurisdiction over applications for habeas corpus from state prisoners. Under the language of the bill as it then read, an application might have been entertained where it appeared (1) that the applicant had exhausted the remedies available in the courts of the state, or (2) where there was no adequate remedy available in such courts, or (3) where such courts had denied the applicant a fair adjudication of the legality of his detention under the Constitution and laws of the United States. In accepting the recommendation of the Judicial Conference, the Congress eliminated the third basis of jurisdiction. S. Rep. No. 1559, p. 9, shows the reason for this as follows:

'The second purpose is to eliminate, as a ground of Federal jurisdiction to review by habeas corpus judgments of State courts, the proposition that the State court has denied a prisoner a 'fair adjudication of the legality of his detention under the Constitution and laws of the United States.' The Judicial Conference believes that this would be an undesirable ground for Federal jurisdiction in addition to exhaustion of State remedies or lack of adequate remedy in the State courts because it would permit proceedings in the Federal court on this ground before the petitioner had exhausted his State remedies. This ground would, of course, always be open to a petitioner to assert in the Federal court after he had exhausted his State remedies or if he had no adequate State Remedy.

[fol. 151] 'The third purpose is to substitute detailed and specific language for the phrase 'no adequate remedy available.' That phrase is not sufficiently specific and precise, and its meaning should, therefore, be spelled out in more detail in the section as is done by the amendment.'

"If the substitution for 'adequate remedy available' of the present definition was intended by the Congress to eliminate the right of a state prisoner to apply for relief by habeas corpus to the lower federal courts, we do not think that the report would have suggested that a remedy for denial of a 'fair adjudication' was in the federal court. The suggested elimination of district and circuit courts does not square with the other statutory habeas corpus provisions. See 28 U.S.C. §§ 2241, 2242, 2251, 2252, 2253, 3d paragraph. We are unwilling to conclude without a definite congressional direction that so radical a change was intended."

And the initial paragraph of the syllabus is in this language:

"Where, on direct review of his conviction, a state prisoner's claim of federal constitutional right has been decided adversely to him by the state supreme court and an application to this Court for certiorari has been denied, he has satisfied the requirement of 28 U.S.C. § 2254 that state remedies be exhausted before a federal court may grant an application for habeas corpus. Pp. 446-450.

(a) It is not necessary in such circumstances that he pursue in the state courts a collateral remedy based on the same evidence and issues. Pp. 447-450.

(b) Section 2254 is not to be construed as requiring repetitious application to state courts for relief. P. 448, n. 3."

This court now puts aside with brief comment, but only after due study and reflection, the argument that the precise issues now submitted to this court have not been presented in the proceedings in the state court relied upon as exhausting state remedies. That contention appears to be

factually unsupported. The history of the appellate proceedings pursued by petitioner has already been set out at great length and this includes extensive disclosure of the issues presented in the various appellate steps. It is true that prior to the filing of the opinion of the Supreme Court of Nebraska in Grandsinger vs. State, 161 Neb. 419, the issue of the denial of the effective assistance of counsel was not tendered at all and the issue of the denial of due process [fol. 152] through the admission in evidence of involuntary and coerced statements of petitioner was only inadequately tendered. But promptly thereafter, and with the State Supreme Court's allowance, upon motion therefor, and in the amended and supplemental motion for rehearing, both questions were squarely and vigorously urged upon the court. That court denied corrective relief despite the presentation of those issues. And certiorari was thereafter sought upon the record thus finally made, and it was denied. Admittedly, this court might have proceeded with greater assurance if the State's Supreme Court had accompanied its final ruling with an opinion. But it was not obliged to do so. And it may be supposed now to have considered and rejected the position taken in the amended and supplemental motion for rehearing. If it were going to disregard it as not really submitted for consideration it should have refused leave to file the amended and supplemental motion. And certainly the denial of certiorari occurred in the face of the whole record as finally made.

Accordingly, whatever this court might have concluded before the decision in Brown vs. Allen, supra, it now considers and holds that the record before it shows an adequate compliance with Title 28 U.S.C., Section 2254. And it proceeds to the examination of petitioner's claims upon their merits.

[fol. 153] At the threshold of the consideration of the merits of the proceeding, it is in order, without purposeless repetition of the language of the pleadings already set forth, to recall the grounds which petitioner asserts for his release from his present custody. They are, first, his deprivation of due process of law, through the admission in evidence in his trial upon the first degree murder charge,

of certain statements or confessions, in part written and partly oral, claimed by him not to have been voluntarily made but rather to have been extorted from him by force and coercion, both physical and mental; and secondly, the denial to him of the effective assistance of counsel guaranteed by the sixth amendment of the Constitution of the United States, through the wrongful conduct of his principal counsel near the close of his trial and the action, thereafter and incident thereto, of such counsel, of the special prosecutor for the state, and of the trial judge. No issue is here made upon the guilt or innocence of petitioner under the murder charge which evoked his trial in, and was the vital question before, the state court. This court is necessarily unconcerned with, and will express no opinion upon, his guilt. Nor will it find facts or discuss problems relating solely to such guilt and not involved, immediately or remotely, in either or both of the two substantive grounds for relief now relied upon by petitioner.

Loyd Carroll Grandsinger was born August 28, 1932. In April, 1954 he was, therefore, approximately twenty-one years, eight months of age. He was five feet six inches in height and weighed slightly more than one hundred twenty pounds. On the score of his racial background, he has some not clearly defined North American Indian blood but is largely white in his appearance. In the way of formal education he had completed the common or grade school courses and between one year and two years of high school studies. In appearance he is alert and intelligent; and he [fol. 154] readily and clearly understands and uses the English language. His mother had died when he was about thirteen years old, but his father is still living. Petitioner was born at Valentine, Nebraska which is near to the interstate boundary between Nebraska and South Dakota, only about twelve miles southerly from it, in fact. His boyhood home had been in the portion of Nebraska and in the neighboring part of South Dakota, largely in the latter state, in which his father lived in April, 1954 and still lives. However, early in April, 1954 and for a few months immediately theretofore, petitioner resided in Bell Gardens, a suburb of Los Angeles, California. He was married and had one

child. Early in April, 1954 he was estranged from his wife but not alienated from her beyond hope of reconciliation. He has a brother, Leon Grandsinger, who is about ten or eleven years his senior, and in early April, 1954 was also in the Los Angeles, California vicinity.

Early in April, 1954 and probably during the predawn portion of April 3, 1954, petitioner and Leon Grandsinger left the Los Angeles area intending to proceed to northwestern Nebraska and to neighboring South Dakota communities. They traveled by automobile and started in a single old Ford car belonging to petitioner. Throughout the trip petitioner was armed with a .22 calibre pistol and before reaching Nebraska, Leon Grandsinger acquired and had a pistol of the same calibre. They also had ammunition with which to use those weapons. They proceeded generally through Las Vegas, Nevada, thence along U. S. highway 66 to Provo, Utah, and on through Rock Springs, Wyoming and Hot Springs, South Dakota, and eventually to Springview, Nebraska. Along the way at various places that are not identified they stole, principally from standing automobiles, items of property whose kind and value are not disclosed. At some point in Wyoming they also stole an automobile and, from that point forward, used it for their motive power and to tow petitioner's older vehicle. Though [fol. 155] they had arrived in the general vicinity where their father lived they did not go to his home or report to him upon their whereabouts; and he first learned of their probable presence in the area only after the occurrence of the homicide out of which petitioner's sentence later arose, and then through a radio newscast in which it was declared that the Grandsinger boys were being sought in that connection.

During the night of Wednesday, April 7-8, 1954 a small store in which was maintained the United States post-office at Wewela, South Dakota[10] was entered burglariously and from it a considerable quantity of merchandise and a very

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[10] That village is located only about two miles northerly from the South Dakota-Nebraska boundary.

small amount of money were stolen. Petitioner and his brother, Leon, were suspected of the burglary.[11]

On April 8, 1954, petitioner and Leon Grandsinger visited at some length at the home of one Brandenburg, a farmer on the Nebraska side of the state line, for whom petitioner had worked for a short while some months earlier, and also with two brothers named Frederickson with whom the two Grandsinger brothers made arrangements that during that evening, the Fredericksons, by the use of a piloting automobile, would direct or lead the two Grandsingers to a secluded place in the general neighborhood where, unobserved, they might do some work on their automobiles. But the Fredericksons then proceeded to make contact with William C. Freeman, the Sheriff of Cherry County, Nebraska, to lead the Grandsingers into a trap and betray them into the hands of the sheriff.

On that night at about 11:30 o'clock, the Fredericksons in their automobile, with the Grandsingers following, Leon driving the automobile that was stolen in Wyoming and with it towing petitioner's unlighted car which petitioner was guiding, drove southerly on highway 7 at a point in [fol. 156] Cherry County, Nebraska several miles east and north of Valentine. Alerted by a prearranged signal, Freeman, the sheriff, and one Marvin Hansen, a member of the Nebraska state highway patrol, in an automobile equipped for police highway pursuit, followed the Grandsingers for a short distance and then, by warning signals, caused them to stop their cars on the west side of the roadway facing south. The officer's vehicle was then stopped easterly from the Grandsinger cars, but so turned and with its lights in such position as to illuminate the Grandsingers and their automobiles. The sheriff then took Leon Grandsinger into custody without any noteworthy incident. But petitioner withdrew from the right side of his towed and then standing automobile and was approached from the rear of the vehicle by patrolman Hansen, and then sought to

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[11] Actually, in one of the statements, whose receipt in evidence upon his trial he charges as violative of his constitutional rights, petitioner admitted the offense and narrated several of its details.

escape by running to the west. Some shots were fired and, shortly thereafter, Hansen was found lying fatally wounded by a bullet which the State of Nebraska charged, and on petitioner's trial undertook to prove, was fired from a .22 calibre weapon. The state's position was that petitioner was the only person involved who was in possession of such a weapon, the pistol of Leon Grandsinger having been seized by the sheriff early in the encounter, and that the pistols of the sheriff and Hansen were both .38 calibre in size. In any event, petitioner escaped for the time being in the darkness and over the rough terrain westerly from the site of the automobiles and of the shooting of Hansen.

Through the remainder of that night and until about 3:00 o'clock in the afternoon of Friday, April 9, 1954, petitioner remained in hiding in the rugged country in that neighborhood and along the northerly bank of the Niobrara river flowing through it. He insists that in that interval he had no rest, though he concedes that he may have obtained some fitful sleep. It is reasonably certain that such rest as he may have gotten was not unbothered.

[fol. 157] Meanwhile, prompted by the homicidal death on duty of one of its members, a large, but not precisely shown, number of the troopers and officers of the State highway patrol assembled in an effort to apprehend the petitioner. And, under the sheriff's direction, a posse was recruited which searched the countryside for the petitioner. The exact number of the posse's members may not be determined or declared with certainty. It appears quite clearly to have approached or reached three hundred. But it was scattered and operating over a wide area in northern Nebraska and southern South Dakota and was, therefore, spread pretty thin. Not many men were effectively gathered at one time in any single space. Most of the members of the posse were armed.

Finally, at about 3:00 o'clock p.m., on April 9, 1954, petitioner observed a number of men arriving in and moving out of automobiles and searching in the area where he was and, in the correct persuasion that he was their quarry, undertook by flight to avoid capture. In the effort he

plunged into the Niobrara river, by whose current he was carried down stream and entirely below the surface of the water, until he reached the safety of a projecting log.

He was then approached by, and induced to surrender to, Brandenburg, his former employer who was generally friendly to him. Immediately before, and when, Brandenburg took him into his custody there was an occasional and audible comment, among the fifteen or twenty members of the posse that were near at hand, suggesting that petitioner should be shot or otherwise killed; and the gun of one bystander was actually discharged but with no injury to anyone. Brandenburg, with little effort managed to prevent any violence towards, or demonstration against, petitioner. And he also delivered petitioner into the custody of the members of the state patrol.

Petitioner was then completely drenched from his en- [fol. 158] counter with the waters of the river. He was unkempt and his hair was disarranged. The temperature was cold and chilling.[12] His clothing was saturated with water and the lower part of one leg of his trousers was badly torn.

In company with four other men, petitioner was first driven a short distance by automobile to the yard of a school house not far distant from where he was apprehended. There the sheriff entered that vehicle and seated himself in the right side of the front seat of the car which was being operated by a State patrolman. Petitioner sat between those two men. And two other men sat in the rear seat. Thus arranged, the occupants of the automobile were driven to the court house, in which the jail is located, at Valentine, several miles distant. That car was accompanied by several other vehicles in which other patrolmen and members of the posse rode. Before the car left the school house yard for Valentine there had been some comment in petitioner's presence and hearing, suggesting that

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[12] There is testimony supporting and some disputing this declaration. But it must be remembered that the day was April 9 and the location the extreme northerly part of Nebraska. In that situation a "warm day" is to be understood in a purely relative sense.

a crowd of people might already have assembled at Valentine and might be disposed to deal violently with petitioner. And it was partly to intercept any such development that a considerable number of men, including several state patrolmen, in other vehicles accompanied the automobile in which petitioner was removed to Valentine.

On arriving at Valentine the car carrying petitioner was driven into the court house yard. When petitioner neared and reached the court house a not precisely determinable number of people, some of whom were armed, had gathered and were present in the court house grounds, including some children as well as adults. They did not in anywise constitute or resemble a mob and offered no violence to petitioner. Nevertheless he was aware from their very presence that they resented the killing of Marvin Hansen, and, suspecting petitioner of the homicide, were unfriendly to him. However, no attempt or threat was made by them [fol. 159] to mistreat him. Promptly on reaching the entrance to the court house, he was taken by the sheriff, accompanied by a state patrolman, and with other patrolmen standing precautionarily by, into the court house and to the District Court quarters on its second floor. He was in handcuffs with attachment to a restraining belt about his body, which had been fastened upon him shortly after his apprehension and, thus fastened, kept in place.

As petitioner was brought into the District Court quarters, a small number of people loitering there were by the sheriff ordered to, and did, withdraw. The sheriff took petitioner into the chambers of the District Judge where several people were present, including Mr. Bryan Quigley, the County Attorney of Cherry County, one Leo Knudsen, a lieutenant of the Nebraska state highway patrol, and his brother Jack Knudsen, for several years theretofore a member of the state patrol who was practiced in the field of criminal investigation, but had previously withdrawn from that employment and was then operating a drug store at Gordon, a small neighboring city. Jack Knudsen had been requested by the County Attorney to come to Valentine and assist in the investigation of the Hansen homicide.

Earlier that day he had interviewed, and taken a statement from, Leon Grandsinger. Petitioner was told quite promptly on his arrival in the Judge's Chambers that he was to be interrogated with a view to the procurement from him of a confession. Thereupon, the County Attorney and the sheriff withdrew and left petitioner, still handcuffed and in restraint in the company of the two Knudsen brothers. Leo Knudsen is a man six feet three inches in height and proportionately large. Jack Knudsen is substantially smaller, a man of ordinary size. Within a few minutes, Mrs. Frances Wells[13] was brought into the room and introduced to the petitioner. She is and then was a member of the Nebraska bar and qualified as a legal stenographer and [fol. 160] secretary, who had theretofore been, but in April, 1954 was not, employed as secretary in the County Attorney's office. And she appeared at the time for the purpose of stenographically recording and transcribing any statement which might be taken from petitioner.

A brief preliminary conversation thereupon ensued between the Knudsens and petitioner, at the close of which one of the Knudsens in the presence, and ostensibly in the name, of petitioner dictated to Mrs. Wells two paragraphs in this language:

"I, Loyd Carrol Grandsinger, make the following voluntary signed statement to Lt. L. E. Knudtson and Jack Knudtson, who have identified themselves to me as a Lieutenant of the Nebraska Safety Patrol and Jack Knudtson is a druggist in Gordon, Nebraska. No threats or promises have been made to me to get me to make this statement. I have been advised that I do not have to make a statement and I know anything I say can be used against me in a court of law.

"I am 21 years of age, being born August 28, 1932, at Valentine, Nebraska. I have been residing in Bell Gardens, California, which is a suburb of Los Angeles, since January of 1954. I was employed by Catalina, Inc. as a receiving clerk. I have a 10th grade education and can

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[13] She appeared upon the trial in this proceeding as a witness for respondent, under the name of Frances Bloom.

read and write. I left California last Saturday, April 3, 1954. My brother, Leon, left with me. I had quite a bit of trouble with my car on the way through. My intention of coming back here was trouble with my wife. I thought maybe it would be best to get away for a while and maybe I could straighten things out between us. I came back here planning on getting work. I had been laid off my job about two weeks previous to that time. I put all my miscellaneous stuff I didn't want to carry with me in Lester's house trailer. I took a gun from Lester's trailer house. Leon and I got in the car and left from there and started back. The car was not in good shape so we didn't travel fast. We had trouble with it so at various times we did work on it. Finally it was completely about shot. It would run but that is about all you could say for it.

Immediately thereupon, the two Knudsens proceeded to interrogate petitioner concerning the details of the trip from California, the movements and actions of the Grandsingers after reaching the Nebraska-South Dakota vicinity, the events at the scene and time of the homicide, the petitioner's movements after the encounter with the sheriff and Hansen and his eventual apprehension. Both of the Knudsens participated in the questioning, one inquiring at [fol. 161] a time, though with no prearrangement as to sequence. And Mrs. Wells stenographically recorded that interrogation. The interview and its recording extended over an interval somewhere between two and three hours ing length, ending at about 6:30 p.m. on April 9, 1954. Immediately thereupon, and while petitioner waited in an adjoining room, Mrs. Wells in the County Attorney's office transcribed the notes of the interview into typewritten characters. For that purpose she required and utilized an additional three hours. The transcription extended through sixteen and one-half pages of typewritten material. As its production progressed, the County Attorney, who had returned but had not been present during the interview, collected the pages successively produced and presented them to petitioner who read and signed each page and on a few of the pages initialed changes in the transcription. His signature on the final page was attested by three men who signed their own names as witnesses but were not present

during, and had no other part in, the taking of the statement. They were Robert E. Hamilton, Mayor of Valentine, Richard Davenport, a banker, and Ben F. Wilkinson, Clerk of the District Court of Cherry County. At the commencement of his interrogation that afternoon, petitioner was still wet, unkempt and unclean. At its inception he was handcuffed and his handcuffs were affixed to a restraining belt, a situation imposed upon him promptly on his capture and thereafter kept in effect, supra. Upon disputed testimony, the court finds from the clear weight of the testimony that at, or shortly after the opening of, and throughout, the actual interrogation and the reading and signing of the statement, he was released from the handcuffs. He admitted the making of such release before the signing but testified that it did not occur until after the completion of the interrogation. The court, however, considers the evidence to the contrary to predominate and be much more persuasive. Leo Knudsen was armed during [fol. 162] the interrogation. Jack Knudsen was not. Neither during nor before the interview did either of the Knudsens or Mrs. Wells or the County Attorney exert any physical force or violence upon, or directly or indirectly offer any threats, or make any promises or inducements, to petitioner.[14] At the commencement of, and throughout, the interview, petitioner was in a state of exhaustion, the precise degree of which may not, from the evidence, be declared with certainty. But these demonstrated circumstances tend to reflect it. He had not eaten anything since about midafternoon of the previous day. Nor, after his capture was he provided with any food until about 9:30 o'clock at night after the interview and his reading and signature of the statement. And since the morning of April 7, 1954, if the state's position be granted that he and his brother had participated in the Wewela burglary, his only sleep had been such as he had gotten while he was briefly resting from time to time in his car and for a short while on April 8, 1954 at Brandenberg's home, or as he had furtively taken during the night of April 8-9, 1954 while he was hiding in the neighborhood where he was later

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[14] Upon this subject a single general finding touching the sheriff and members of the state patrol is made later herein.

captured. He was, besides, in such state of perplexity as would naturally be prompted by the awareness of his position after the encounter on the highway in the night of April 8, 1954 and by his pursuit and capture by the law enforcement authorities and the posse.

Concerning the real significance of the statement emerging from the interview discussed in the most recent paragraph there appears to be a difference of opinion on the part of counsel. It is variously asserted to be a confession and denied to have that consequence. In the form in which it is before this court and was introduced in the trial of petitioner for murder in the District Court of Cherry County, Nebraska, a large segment of it, including a brief portion of its fourteenth page, all of its pages fifteen and [fol. 163] sixteen, and the first part of its page seventeen, has been covered beyond the possibility of determining its content. What that excluded material was the court may not know and offers no suggestion. But the rest of it, which, upon the trial for murder was received in evidence, is really just a factual and historical statement, almost completely in recorded questions and answers, not directly or unequivocally confessing the killing by petitioner of Hansen or even petitioner's firing of his pistol, whether intentionally or otherwise, during his encounter with Hansen. Still, it does not categorically deny the firing of the pistol. On the contrary it allows, and seems to advance, a supposition that in an effort to get rapidly away from the scene of the encounter petitioner's pistol was discharged while he had it, but perhaps without his intention, and that in consequence of that discharge Hansen was killed, although petitioner professes in the statement not to know that that supposition reflects the real occurrence. The instrument is, therefore, a statement rather than a "confession" strictly so-called. Nevertheless, a jury examing and considering it might well regard it as inculpatory in character. And in the context of petitioner's trial in the state court, it was an item of material evidence calculated to be greatly to his disadvantage.

After the signing of the statement just discussed, petitioner was provided by the sheriff with a meal which that

officer had purchased for him. After he had eaten that meal, and at about 10:00 p.m., on April 9, 1954, and still in the District Court area in the court house, the questioning of petitioner was resumed, this time by the sheriff, Lieutenant Leo Knudsen, and a Captain Smith of the highway patrol. That interrogation extended until a time somewhere between 2:00 a.m. and 5:00 a.m., and, as the court believes from the evidence, about 3:00 a.m. on Saturday, April 10, 1954. He was then taken to the jail for sleep during the [fol. 164] remainder of the night. Exactly what additional information, if any, was obtained in that interview does not appear from the record before the court.

On Saturday, April 10, 1954 after waking and eating breakfast petitioner was questioned further for a short but not exactly identified time, by the sheriff, Captain Smith and another member of the highway patrol. During some of that time there was also present a news reporter who asked a question or two. In that session also, finger prints and photographs were taken of petitioner. Again, the exact substance of the interrogation is not made clearly to appear.

Also on April 10, 1954 and from about 10:00 a.m. until 3:00 or 3:30 p.m., petitioner was taken by the sheriff and others to the place where the homicide had occurred where he remained during most of the interval, and later returned to the jail. In the course of that trip and at the scene of the shooting he cooperated with the officers, including the sheriff, by directing the placing of automobiles and persons in places to simulate the positions of the vehicles and men involved in the event of the night of April 8, 1954. And in association with and as a part of that "recreation of the situation", photographs were taken and a question and answer statement, with the County Attorney as the inquirer and petitioner as the addressee and answerer, was stenographically taken by one Ted McElhaney, the official court reporter of a neighboring state court district. During the murder trial that statement, which was transcribed but not signed, and the photographs or some of them were received in evidence. And because of their disclosure of petitioner's presence at the site and time of the homicide and his location and movements, those items have to be regarded as material evidence to his disadvantage.

After the return of petitioner to the jail that afternoon and his evening meal, he was again questioned in the District [fol. 165] Court area of the court house from an early evening hour not exactly defined until late at night. The result is not clearly disclosed.

Again on Sunday, April 11, 1954 petitioner was taken to the District Court area and interrogated by the same three men from some time after a breakfas at about 8:30 a.m., until shortly before noon. Whereupon, he was returned to his cell in the jail.

At about 5:00 or 6:00 p.m. of the same day, by prearrangement with the County Attorney of Cherry County, George H. Reis, a post-office inspector, with headquarters at Pierre, South Dakota, James F. Shoemaker, Sheriff of Tripp County, South Dakota, and Frank B. Cole, merchant and postmaster of Wewela, South Dakota and the victim of the Wewela burglary of April 7 or 8, 1954, appeared, and petitioner was taken to the District Court area to be interviewed by them, and especially by Reis, in relation to the Wewela burglary. Petitioner was acquainted with, and friendly to, Shoemaker. In the presence of Shoemaker and Cole, Reis interrogated petitioner and prepared a statement in narrative form reflective of the substance of the interview. The statement was prepared sentence by sentence in the language of Reis, who, however, as he proceeded, sought and obtained the approval by petitioner of each of its items. The period of between two and one-half and and three hours was required for the interview and the preparation of the statement which was in three single spaced typewritten pages. When it was completed, petitioner read it, initialed some three minor alterations in it, and signed each of its pages and swore to it in the presence of Reis in his official capacity, and of Shoemaker and Cole, each of whom signed the statement as a witness. During the murder trial the statement was received in evidence upon the state's offer. In almost its entirety it relates wholly to the Wewela burglary and that was the motive for its procurement. Even [fol. 166] that part of it, however, has relevance and materiality to the murder case in that it reflects the bur-

glary at Wewela on the night before Hansen's fatal pursuit of petitioner and Leon Grandsinger and suggests a persuasive motive for the effort of the latter two to elude or escape from apprehension. Petitioner seems not to charge that any inducement or promise or force or coercion, physical or moral, was directly employed or exerted upon him to obtain that statement. No persuasive evidence of such action moves this court to find that it occurred. But he is understood to make two contentions against its use upon his trial. The first is that, although no force or coercion or inducement or promise was immediately employed to get the statement, it has to be regarded as forced and involuntary because of the entire history of his treatment after he was taken into custody. The second is that Reis intruded into the statement two items which are not reflective of anything which petitioner had told him. These are, a) the following sentence early in the statement:

"Previously I have made a statement to officers concerning my shooting of officer Marvin Hanson." (sic), and b) these sentences from the next to the last paragraph:

"We were stopped on the road east of Valentine about 20 miles and were stopped by Sheriff Bill Freeman and Highway Patrolman Marvin Hanson, (sic). I previously have made a statement to officers concerning my shooting and killing Patrolman Marvin Hanson." (sic)

Since the quoted language of the statement contains a manifest implication of the petitioner's actual shooting and killing of Hansen, it was calculated to be materially and relevantly damaging to him as evidence in his trial. But, from considerations discussed at some length later herein, the court is convinced as a matter of fact that petitioner [fol. 167] has not proved either that the written statement of April 11, 1954 was made as a result of any promise, inducement, force or coercion or that the quoted language was introduced into it by Reis without being declared by petitioner himself.

On Monday, April 12, 1954, a warrant of arrest was served for the first time on petitioner. On that day also he was

removed from the jail and taken before the County Judge and formally arraigned on the murder charge and pleaded not guilty to it. He was then returned to the jail. As an item subsidiary to his main contentions in this proceeding, petitioner asserts that he did not know when he was taken to county court for what purpose he was being taken, and that he did not understand the arraignment or his plea and merely followed the directions of the County Attorney in pleading not guilty. But, on the whole evidence, the court finds that that assertion is not true either in its entirety or in any of its parts.

Until his arraignment and for about two days thereafter petitioner was not allowed by the sheriff to see or interview any member or members of his family. His father had called at the sheriff's office on April 9, 1954 and asked to see him but was refused access to him and told to return for that purpose on Wednesday, which was April 14, 1954. A woman cousin of petitioner asked to see him on April 10, 1954 and again on April 12, 1954; and each time her request was refused. She called and saw him without objection on April 14, 1954. On that day also he was seen by his father and another friendly person and also by Mr. William C. Heelan of Valentine, an attorney at law then recently employed for him by his father, vide infra. The earlier refusals of access to petitioner, whether by the sheriff or by another in charge of the jail, were responsive to the sheriff's resolution to postpone contact with him from the outside pending the completion of such interrogation of him as [fol. 168] might be desired. Even after his arraignment petitioner was further interrogated from time to time, but it does not appear that in that interval any statement from him was taken which is drawn directly into question in this proceeding.

Petitioner strongly insists that, from the moment of his delivery to the sheriff until—and even after—his arraignment, he was subjected to repeated manifestations of violence and force, both physical and mental, in some measure by members of the Nebraska state highway patrol, but largely by the sheriff himself. And he has offered evidence, chiefly, in the way of his personal testimony, but to some

extent through the testimony of others, which, if true, supports that position. But generally and in most of its particulars, that testimony is disputed. Putting aside for the moment the primary claim in that connection of the involuntary and coerced character of the statements, written or oral, attributed to him and received in evidence in the course of his murder trial, and dealing directly only with the subsidiary charge of the use towards him of force and coercion, or either of them, the court is convinced that petitioner has failed to prove by the preponderance of the evidence the exertion on him of such coercion or force.

The attempted proof of any such conduct by members of the highway patrol is simply unconvincing. Generally, in its greater part it is rather too indefinite and vague to be considered adequate foundation to support the overturning of a jury's verdict found and returned after a long trial and sharp conflict. One item of that character deserves special and direct attention. One John Riley Skinner who in April, 1954 was a member of the highway patrol, was called as a witness in the supplemental hearing herein, principally because of his volunteering, after the earlier part of the hearing, to present further support of the charge of physical and mental mistreatment of petitioner by the [fol. 169] sheriff on the way to Valentine in the afternoon of April 9, 1954. When he testified he did offer such additional support. But he also went farther and testified that on the trip to Valentine he himself had both physically mistreated petitioner, e.g., by pulling his hair twice, and had also talked to petitioner abusively and menacingly. The court does not regard Skinner as a credible witness. His bearing and manner in giving evidence were not favorable to his acceptance as worthy of belief. And he had a rather obvious motive to discredit the patrol and the sheriff. On April 9, 1954 he was only a recently enrolled member of the patrol in which he had first been employed in September, 1953. By June, 1955 he had resigned from his position in the patrol upon request of one of his superior officers who was one of the men responsibly in charge of the search for petitioner on April 9, 1954, by reason of exceptions that had been taken both to the accuracy of Skinner's daily re-

ports and to his use of a patrol automobile. His attitude towards the patrol was something less than cordial.

And, upon conflicting evidence touching the question, the court is satisfied that the petitioner has not convincingly established any mistreatment of him by the sheriff. This is true despite one incident. While stopped briefly on the school house grounds before leaving for Valentine, the sheriff at the request of news photographers placed his hand rather roughly on petitioner's head and turned it around. The court was and is frankly unimpressed by that officer in his appearance as a witness in the trial of this proceeding. But his asserted oppression of petitioner during the investigatory phase of the latter's prosecution is a matter of concrete fact; and the court finds that it has not been proved. Consideration has been given to the evidence both ways upon this point, that offered by petitioner himself, that of Skinner, that of a witness Sheppard and [fol. 170] and other testimony and facts tending to support petitioner's position on the score of coercive oppression, as well as that of the sheriff and several other witnesses to the contrary. What has been said of Skinner's testimony relating to the acts of any patrol members, including himself, is largely but not equally true of his statements touching the sheriff's acts and speech. Sheppard's evidence, in the court's estimation, based upon observation of him as a witness, is also unconvincing. Despite his profession of a reluctance to recall an incident discreditable to a peace officer he had really no such reluctance and testified willingly, almost eagerly. In this connection the court has attributed no practical significance to the effort of respondent to show that, notwithstanding his denial, Sheppard had been convicted of a felony. The judicial record upon the point is highly ambiguous, enough so that the witness' denial of the conviction may be regarded as merely his understanding of the legal effect of the record; and an understanding which is not necessarily unsound. And even if he be wrong in his understanding, the asserted conviction does not imperatively discredit him as a witness. In fact, the court sees no reason in the present context to accord that consequence to it. The court merely

regards Sheppard as an unconvicing witness, quite apart from the collateral matter of his alleged earlier conviction on a felony charge. On the whole record, it is found that the contention of the use of threats or force or violence, physical or mental, upon petitioner has not been established. But the court recognizes that that point alone is not decisive upon the broader question of the freedom and voluntariness and admissibility in evidence of the several statements of petitioner, whether written or oral.

One difficulty which the court has encountered at this point in its ruling is the virtually complete absence of oral evidence upon it from a strictly disinterested, as well as [fol. 171] credible, source. From the standpoint of respondent, the factor of interest affects the testimony of the members of the State patrol and the sheriff and such other persons as participated in the apprehension and interrogation of petitioner. For petitioner neither Skinner nor Sheppard is regarded as a really disinterested witness. And, as a witness, petitioner is himself subject to the most compelling quality of interest. His very life is in the balance and may well be considered to depend upon his evidence. The weighing of testimony emerging from such sources is admittedly a difficult task, its conclusion something less than infallibly sure.

After careful examination of the record before it, the court finds that the petitioner has failed to prove by a preponderance of the evidence, as a matter of primary and independent fact, his allegations that his statements were, or that any of them was, involuntary, coerced or the product of threat, force, violence or undue pressure exerted upon him by anyone. That the burden of proof upon that issue rests upon him he recognizes; and he has undertaken to carry it. The law so requires. Hawk vs. Olson, 326 U. S. 271; Johnson vs. Zerbst, 304 U. S. 458; Walker vs. Johnston, 312 U. S. 275; Williams vs. Kaiser, 323 U. S. 471; Brown vs. Allen, supra.

While the entire record of petitioner's trial in the state court is not presently before this court as evidence, much of it is; and that includes the trial judge's charge to the

jury. And this court has precautionarily read and examined the 1243 page transcript of testimony in that trial which, though only partially introduced and subject to consideration as evidence in this proceeding, is physically in the court's possession. From what is strictly before this court, it appears that in the state court trial petitioner made timely challenge to the various statements attributed to him on the score, of t[illegible]ir coerced, extorted and involuntary character. The trial judge allowed evidence to be in- [fol. 172] troduced and received responsive to those challenges, and, in his charge, submitted the issue thus made to the jury for its determination. Three pertinent instructions included in his charge are copied in a footnote hereto.[15] Upon due consideration, this court believes that the

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[15] Instructions numbered 20, 21 and 22 of the trial judge's charge follow:

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Instruction No. 20.

The jury is instructed that evidence has been introduced tending to show that the defendant made certain verbal admissions or statements appearing in evidence. Verbal statements or admissions should be received by you with great caution, as they are subject to much imperfection and mistake, owing to the person speaking not having clearly expressed his own meaning, or the person spoken to not having clearly understood the speaker. It frequently happens, also, that the witness, by unintentionally altering a few words or expressions really used, gives an effect to the statement entirely at variance with what the speaker did say. In this connection the jury should bear in mind the infirmity of memory and that the mind of the prisoner himself is often oppressed by the calamity of the situation, and that he is sometimes influenced by motive of hope or fear to make statements."

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Instruction No. 21.

The State has offered in evidence alleged statements and admissions claimed to have been made by the defendant. The defendant contends not only that these statements were not voluntarily made but also that they do not correctly reflect what he said or meant. Before you can consider any such alleged statements or admissions as evidence, you must be satisfied and believe from the evidence:

1. That such statements or admissions were made by the defendant;

2. That at the time same were made the defendant was mentally capable of making the same; that he understood what he was doing, and the effect thereof, and;

3. That same were made freely and voluntarily and not by reason of any hope or fear on [illegible] part or by reason of any promises, threats, inducements, coercions, or compulsions of anyone.

In determining these questions you should consider all the evidence given in the trial of this case, examining and analizing (sic) it carefully, taking into consideration the position of the defendant at the time such alleged statements or admissions are claimed to have been made by him,

cited portion of the charge fully and fairly and correctly submitted the issue to the jury, whose prerogative it was to pass upon it. The ensuing verdict of guilty is consistent with, though it does not necessarily establish, the jury's acceptance of the view that the several statements, or some of them, were free, voluntary and uncoerced. Brown vs. Allen, supra. This court, however, considers the fact of the orderly and correct submission of that issue to the jury not as presently binding upon this court, but only after the fashion contended for in Brown vs. Allen, supra. And, though factually rejecting, supra, petitioner's charge of threat or personal force or coercion, physical or mental,

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the circumstances surrounding him, the credibility of the witnesses detailing the circumstances, defendant's strength or weakness of mind and body, his mental and physical condition as shown by the evidence, the probability or improbability of the alleged statements or admissions, and whether the same, if made by the defendant were made by reason of any hope or fear on his part or induced by any promises, threats, inducements, coercions or compulsions.

If you are satisfied by the evidence that any such statement or admission was made by the defendant, and that the defendant knew at the time what he was doing, and was mentally capable of making the same at the time, and that same was freely and voluntarily made by him, and not induced by any promises, threats, inducements, coercions or compulsions on the part of anyone, then you should consider any such statement or admission so made and give the same such credence and weight as you deem it entitled to receive, and if the jury believes all or the whole of any statement or admission to be true, they should act upon the whole as true. But the jury may believe part of any such statement or admission and reject the balance, if they see sufficient grounds in the evidence for so doing.

On the other hand, even if you believe any statement or admission to be true you should wholly disregard and not consider any statement or admission in evidence, if you are not satisfied from the evidence that the same was made by the defendant, that it correctly reflects what the defendant said or meant, and that at the time of making the same he knew what he was doing and the effect thereof, that he was mentally capable of doing so, and that same was made voluntarily and freely by the defendant, and not induced by any hope or fear or his part or by reason of any promise, threat, coercion or compulsion of anybody."

"Instruction No. 22.

You are instructed that the law does not bar all inducements which may be made in an effort to secure a statement or admission from one suspected of a crime. Such statement or admission is not rendered involuntary merely because it is elicited by inquiries and questions addressed to the accused by officers or the mere fact that it was made after a prolonged examination of the accused or the mere fact that the accused was in the custody of the officers at the time it was made. It is for the jury to determine from all these facts, if they be shown, and all the surrounding circumstances in evidence whether any statement or admission so offered was in fact voluntary."

practiced upon petitioner, the court was considered the facts clearly demonstrated to have occurred as reflective adversely upon the freedom and voluntariness of petitioner's statements, and each of them. These include the facts and circumstances leading up to his capture on April 9, 1954, his then mental state and bedraggled physical appearance and condition; the delay until late in the night of his apprehension in providing petitioner with food; the duration of the interval between his apprehension and his preliminary hearing; his detention during that time in confinement and in the sole custody of the state and its officers; the denial then of access to him by members of his family; the fact that through that time he had no legal counsel; his repeated interrogation generally for considerable periods of time and by different investigators; and in generality the entire history of his custody and treatment. But, in the absence of the establishment of actual and practicable threat, force or coercion as a factor supporting or inducing [fol. 173] or generating the statements, or any of them, the court is persuaded that the history of petitioner's treatment just summarily recalled should not be allowed, in and of itself to require the rejection of the statements or to overturn the conviction and sentence resting in part upon their reception.

The foregoing conclusion is valid especially when one regards the circumstances in which the three most significant statements were made. These were the written question and answer statement of April 9, 1954, the stenographically recorded interview at the scene of the homicide on April 10, 1954, and the narrative statement to post office inspector Reis on Sunday, April 11, 1954.

The argument against the validity of the statement of April 9, 1954 proceeds upon the supposition that it was gotten only after some six hours or more of relatively continuous questioning, at the end of which petitioner yielded and confessed. But that notion is completely unrealistic and fallacious. Petitioner was taken to the court house and into the District Court precincts with due punctuality upon his apprehension. Once there, and without badgering or

undue pressure, and with only brief preliminary inquiry, the interrogation proceeded. And it has to be remembered that that interrogation constituted the statement. It was not something that preceded a confession. The interrogation itself required about three hours for its completion. What followed was merely the transcription of the notes reflecting the interview; and that took an additional two and one-half or three hours. The time was required and consumed in the actual making of the statement, rather than in efforts upon petitioner to induce its making.

Much the same is to be said of the narrative statement taken by Reis on the evening of April 11, 1954. He and petitioner proceeded, at once on their coming together, to the making and recording of the statement. On that occasion their conversation was not directly recorded but was, [fol. 174] rather, substantially reflected in historical fashion; and that consumed the not at all unreasonable time of two or three hours.

And the demonstration and photographing and the interview, recorded by a court reporter but not submitted to or signed by petitioner, which occurred at the scene of the shooting during the afternoon of April 10, 1954 was not something which produced results only after protracted grilling. It took some time for its own accomplishment, indeed; but it does not represent a period of pressure, moral or physical, followed by a confession.

The court is not unaware that, through all of those days, petitioner labored under the difficulties that inevitably resulted from his activities on April 7 and 8, 1954 and that portion of April 9, 1954 preceding his apprehension, and under the emotional strain that was associated with his capture and custody under a not ungrounded suspicion that he was guilty of the murder of a peace officer. Those circumstances, doubtless, served measurably to depress him and to predispose him to anxiety. But they were quite properly not allowed to immunize him from orderly investigation by the State's authorities charged with the administration of its laws and the maintenance of its good

order. Persons suspected of, and taken into custody for, the commission of crime, even if the crime be deliberate murder, have constitutional rights which must be respected and jealously safeguarded. But the judicial conservation of those rights must not become maudlin. Officers charged with the detection and prosecution of persons so suspected and apprehended are not required to become queasy in the performance of their duties. The efficiency of civilized criminal investigation must not be nullified by an overemphasis upon the immunities of suspected criminals which results ultimately in the destruction of the security of society's observers of its laws. One in cus- [fol. 175] tody in the belief that he is guilty of a major felony must expect to submit to fair and reasonable and humane, even if persistent and searching, inquiry. Thus only—or at least principally—may the facts be found. And, if he be guiltless, his interrogation should serve to point the way to reality and hasten his release.

In finding against petitioner upon the issue of the alleged involuntariness of his statements and their constitutional inadmissibility as evidence against him in the trial for murder, the court is dealing only with that issue as a direct and primary ground for his discharge from custody under the writ heretofore issued in this proceeding. That finding does not reach the significance of that issue as an asserted phase of the vital charge that, for reasons and by means already explained, petitioner in his trial was deprived of the constitutionally guaranteed right of the effective assistance of counsel. The court proceeds, finally, to its determination of that question. And, first, the facts relating to it will be found and announced.

Petitioner was not represented in his state court trial by court appointed counsel. So far as the record discloses, no such appointment was made or sought. While petitioner was not represented by, and did not confer with, counsel until April 14, 1956, two days after his arraignment and plea of not guilty, he did on that date confer with Mr. William C. Heelan who had theretofore—though exactly

when does not appear—been employed for him by his father. Mr. Heelan was a member of the bar of Nebraska in good standing and of long experience who was in practice at Valentine. He had been admitted to the bar in 1911. (see Vol. 89 Neb. p. V). Then, as of a date which is not clearly shown, petitioner's father also employed in petitioner's behalf, Mr. Charles A. Fisher, a practicing attorney in good standing, of Chadron, Nebraska who had been a member of Nebraska's bar since 1927. (see Vol. 115 Neb. p. V). As the much younger and, therefore, the more vigorous of the two attorneys, as well perhaps as [fol. 176] because of his wider experience in jury trial work, Mr. Fisher served as petitioner's principal attorney. Mr. Heelan's position was substantially that of an assistant to or associate of Mr. Fisher in the trial and in the work preparatory thereto. At this point it may be observed that, although both of petitioner's attorneys participated actively in his trial in the state court and later joined in signing the motion for new trial and petition in error, Mr. Heelan died on a date that is not shown, but was quite early after the trial and substantially before the submission of the appeal to the state's Supreme Court. For practical purposes, petitioner's only attorney in his basic appeal, and except as has already been indicated, was Mr. Fisher.

The information, filed on May 7, 1954 in the District Court of Cherry County, Nebraska after preliminary hearing in the County Court, contained two counts, the second of which charged petitioner with the killing of Marvin Hansen in the course of the commission of another felony. On June 1, 1954, Messrs. Fisher and Heelan in behalf of petitioner filed a motion to quash that second count as being beyond the court's jurisdiction; and, after hearing on the following day, the motion was sustained and the assailed count was dismissed. On the latter date also, the arraignment of petitioner was had in the District Court of Cherry County and he entered a plea of not guilty to the remaining count which charged him with premeditated murder in the first degree.

Petitioner's trial was opened on Friday, June 5, 1954, and proceeded on June 5, 7, 8, 9, 10, 11, 12, 14 and 15, 1954. It was completed and submitted to the jury at 5:00 o'clock p.m., on June 15, 1954.

In the course of the trial it became highly material to establish the cause of Hansen's death and, if it were a bullet wound, to show the calibre of the bullet. As has already been stated, the only .22 calibre firearm identifiable as being in the neighborhood at the time of the killing was the pistol which had been traced into petitioner's posses- [fol. 177] sion, but could not be located after the tragedy. The evidence showed that Leon Grandsinger's .22 calibre pistol was not fired that night and that only .38 calibre pistols were in the possession of the sheriff and Hansen. By medical testimony the state had introduced evidence that Hansen's death was caused by a .22 calibre bullet. And by other evidence it had also undertaken to show that a hole in a pants belt[18] being worn by Hansen when he was shot, which was located at a point immediately outside the point in Hansen's body where the fatal bullet entered, was also made by a .22 calibre bullet. The pants belt had been identified as an exhibit during the trial and shown to the jury. And it was being kept among the exhibits in the case.

During the morning of April 15, 1954, after the evidence in the trial had been concluded and when the next step in the trial was to be the oral arguments of counsel, which would be followed immediately by the court's charge to the jury and the consequent submission of the case, the exhibits, including the pants belt, were on a table in the court room. The jury was not yet recalled to, and was not in, the court room. In that situation, Mr. Fisher approached the table bearing the exhibits, picked up the pants belt and a wooden dowel and pushed the dowel through the hole in the pants belt with force sufficient to enlarge materially the size of the hole in the pants belt. Without his expectation, Mr. William Quigley, the County Attorney, came into the

[18] Not to be confused with a "Sam Browne" belt also worn at the time by Hansen and also bearing holes of the same general character.

room and saw him in that act. At that time in the judge's chambers adjacent to the court room, the trial judge, Mr. Rush C. Clarke, Special Prosecutor, who had largely tried the case for the state, and Mr. Heelan of defense counsel, were already present in anticipation of the initiation of the closing arguments of the trial. After Mr. Quigley had overtaken Mr. Fisher in the latter's tampering with the belt, Mr. Quigley and Mr. Fisher came into the judge's chambers, and Mr. Quigley orally disclosed to the judge in [fol. 178] the presence of Messrs. Clarke, Heelan and Fisher, what he had just observed in the court room in the way of Mr. Fisher's conduct. Mr. Fisher did not deny, but admitted, the accusation. Thereupon, a conference between the judge and the four attorneys ensued which consumed somewhere between forty minutes and one hour. At or very shortly after its close the judge went upon the bench, the jury was recalled into the court room, counsel appeared, and in the presence and hearing of the jury, the following proceedings were had and taken, of which the official court reporter made a complete record:

"By Mr. Clarke:

Before we proceed with the arguments, Your Honor, there is a matter that has been taken up with, Your Honor, which we wish to get into the record.

The Court: Very well.

Mr. Clarke: We wish the record to show that counsel for the defendant, is willing that it shall show, that this morning in this court room, after the court reporter had brought all the exhibits in the case out and laid them on the reporter's desk, Mr. Fisher, one of the counsel for the defendant, while he was examining Exhibit No. 10, being the leather pants belt heretofore identified as the belt of Marvin Hansen, and that at that time he took a dowel, being one of the wooden dowels on the reporter's desk, and being either the same or one exactly like the one I am holding in my hand, which I will have to have marked as an exhibit, and pushed it violently—

Mr. Fisher: (Interrupting) I didn't violently push it—

Mr. Clarke: (Interrupting) pushed it through the hole in the belt hard enough so that it materially enlarged the size of the hole to an extent which cannot now be determined and that the belt, Exhibit No. 10, is not now in the same condition as it was when it was offered in evidence and received in evidence, and that the hole is now materially larger than it was before Mr. Fisher did that.

(Mark this dowel as an exhibit, please.)

(The wooden dowel refered (sic) to was marked as Exhibit No. 75.)

The Court: Mr. Fisher, as I understand it you have told counsel that you did that?

Mr. Fisher: Yes.

[fol. 179] The Court: You recognize that the hole is larger?

Mr. Fisher: Yes.

The Court: The court admonishes all counsel and everyone else and the jury when they go to deliberate upon this matter to not probe these exhibits. They can make comparisons but they cannot probe these belts with any dowel, or change the condition of any exhibits. Very well, you may proceed."

Petitioner had not seen Mr. Fisher's conduct and knew nothing of it. Nor had he participated in the conference in the judge's chambers between counsel and the judge. So far as appears in this record, he had no part in, and gave no approval of, the proceedings had in open court before the jury in the way of the making of the record just quoted. While he heard its making there is no showing that he had any anticipation of, or as to its import or significance to him understood, it. He had, however, overheard Mr. Fisher, on emerging from the judge's chambers, remark that he might be subjected to discipline; but for what, petitioner did not know.

The record before this court does not show the course of the full discussion which had occurred in the judge's chambers beyond what has already been found, supra. But from the material thus dictated into the murder trial record before the jury, the conclusion is inescapable that in that conference, Mr. Fisher had agreed to allow, and participate in, the making of the record thus dictated; that Mr. Clarke had insisted upon, and agreed to lead in, its making; and that the trial judge was aware of what was to be done, and whether willingly or reluctantly, doubtless the latter, participated in it. It is impossible to conclude or find what part Mr. Heelan had in the arrangement for the making of the record before the jury. But he made no protest when it was made. There is nothing in the record before this court which leads this court to suppose that Mr. Heelan had any part in Mr. Fisher's tampering with the belt or knew in advance that it was to occur.

[fol. 180] Immediately following that incident, the closing arguments of counsel were made in which Mr. Fisher participated in petitioner's behalf; and the court charged the jury and submitted the case to it.

The court has already announced a finding as to the hour at which the verdict of the jury was returned and the character of the verdict. It has also made a finding of the almost immediate preparation and filing by Mr. Fisher of a motion for new trial, and the submission and denial of that motion and the imposition of the sentence of death upon petitioner.

Reference is now made, without repetition, to the earlier findings herein of the failure of either the motions for new trial or the petition in error to raise at all any issue upon the disclosure before the trial jury of Mr. Fisher's conduct touching the pants belt, and also to the generalized presentation in those two pleadings of the issue of error in the reception of evidence and the lack of vigor and directness and precision with which, on the initial appeal, that issue was briefed in the state's Supreme Court. It is now noted and found that upon the subject of the reception in evidence of the statements, oral and written, of petitioner, that court

in those parts of its opinion in review of the conviction and sentence which are directly pertinent, said:

". . . There are exhibits in the record showing the position of the three cars after they stopped. As a matter of fact, photographs received in evidence show the location of the cars and the position of the sheriff, patrolman, and defendant as they alighted therefrom. Such locations and positions were fixed by defendant himself on April 10, 1954, when he voluntarily made a statement to officers at the scene of the tragedy."

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"During the afternoon of April 9, 1954, defendant voluntarily made and read a written confession which, by interlineation, was corrected in certain particulars by defendant in his own handwriting and signed by him on each page thereof in the presence of three witnesses who signed as [fol. 181] such. Again, on April [April] 10, 1954, defendant voluntarily gave another transcribed similar statement at the scene of the crime during which he placed the cars, himself, the sheriff, and the patrolman in the positions where they were located at the time of the shooting, and demonstrated what happened there. Again, on the afternoon of April 11, 1954, defendant voluntarily made and read another written confession which also, by interlineation, was corrected in certain particulars by defendant in his own handwriting, and was signed by him on each page thereof in the presence of two witnesses who signed as such. Further, such confession was subscribed and sworn to before a post-office inspector who as such acknowledged same.

"Defendant in his testimony claimed that the confessions aforesaid were not voluntarily given, and equivocally denied that he had made several statements contained therein. However, those were matters for determination by the jury under appropriate instructions given by the trial court."

(Emphasis added).

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"Defendant argued that the trial court erred in admitting part of a conversation which defendant had with a sheriff from South Dakota who was a friend of defendant and present when defendant made a confession on April 11, 1954. The conversation is too long to set forth here. It is sufficient for us to say that the trial court admitted it solely for the limited purpose of helping the jury decide whether or not such confession was voluntary, and the jury was so cautioned by the court. Defendant, in his objections to the conversation said that, 'even though it might tend to' so assist the jury, such conversation was inadmissable because it related in part to another crime previously committed by defendant. In that regard, defendant testified at length about such conversation, and, even assuming that a part thereof offered by the State was erroneously admitted, it could not have been prejudicial to defendant's rights. We find no prejudicial error in admission of the evidence under the circumstances."

It is obvious from the foregoing quotation that the consideration which the Supreme Court of Nebraska gave to the challenge to the reception in evidence of "a conversation which defendant had with a sheriff from South Dakota" (relating clearly to a part of the setting for the statement given to Post-Office Inspector Reis) was oriented to the admissibility of that conversation as foundational material despite its inclusion of an admission by petitioner of his earlier apprehension on account of other transgressions of an unidentified nature. It does not disclose a consideration of and ruling upon the basic question of the admissibility [fol. 182] of the statements of petitioner concerning the offense for which he was on trial. Upon that subject, it would appear from a careful reading of the opinion that the consideration and ruling of the court are reflected and expressed only in the two sentences most recently underlined herein. And while it may well be that the language just adverted to should be regarded broadly as adequate to declare a judicial finding that, in point of fact, the issue of the freedom and voluntariness of those statements, had been submitted properly to the jury under legally correct instructions, the conclusion is inescapable that no such de-

claration is explicitly made by it. True, the matters were "for determination by the jury under appropriate instructions given by the trial court." But had the reviewing court examined the record and the instructions and found the instructions to be appropriate and the evidence adequate, within those instructions, to support a jury's finding that the statements and each of them were free and voluntary? The court does not appear to have felt called upon so to assert. And it may very well be that one reason for its disinclination to proceed that far was the tenuous character of the issue as it was presented to that court upon the appeal.

Reference has already been made, and will not be repeated, to petitioner's discharge of Mr. Fisher as his counsel and the date of such discharge. The further appellate proceedings in the State's Supreme Court, the unsuccessful quest of review through certiorari and this proceeding have followed that discharge.

Against the factual background in its entirety, which has already been set forth, the court is confronted with the question whether, upon the record, petitioner has made out a case adequately supporting his charge that, by the conduct of Mr. Fisher, in relation to that of Mr. Clarke in behalf [fol. 183] of the State of Nebraska and of the trial court, he was deprived in his trial of his constitutionally guaranteed right to the effective assistance of counsel. In full awareness that he carries the burden of proof upon that issue, vide supra, the court concludes that the question has to be answered affirmatively. In reaching that answer, consideration has to be given first to his plight throughout his trial and to what actually occurred and its meaning.

As petitioner approached his trial his life was at stake. He was charged with the crime of murder in the first degree in the disturbing circumstance that the victim of the asserted homicide was a state officer engaged in the performance of his duty of preserving the public peace. His problem was complicated further by his own then recent engagement in various unlawful acts whose probable un-

folding in the course of his trial would almost inevitably impinge adversely upon his defense.

His father, in his behalf and with his approval, employed as his attorneys Messrs. Heelan and Fisher, both of whom were recognized and experienced attorneys at law. So far as anything before this court discloses, no antecedent relations had existed between those attorneys, or either of them, on the one hand, and petitioner and his father, or either of them, on the other. And the employment appears to have been made upon the faith of the attorney's recognized acceptance as members of the legal profession. Petitioner entered upon his trial, relying upon the ability and integrity of his attorneys, and, until the incident immediately preceding the oral argument, nothing had occurred to impair that reliance.

The evidence received in the course of the long trial had served to intensify, rather than to minimize, the danger of petitioner's position. Besides other damaging material [fol. 184] against him, several of his own statements involving inculpating admissions on his part had been received. With the issues thus none too hopefully drawn, the critical occasion for the final submission of the case was immediately before the participants in it.

In that situation, Mr. Fisher upon his own initiative and responsibility, and without petitioner's participation or awareness, meddled with the pants belt in the way which has already been discussed, and thereby altered a vital item of evidence in such wise that thereafter it appeared, and would continue to appear, materially different from its appearance when it had first been introduced and received during the trial. Detected by the County Attorney in his misdoing, he was taken into the trial judge's chambers for what was undoubtedly a mortifying interview between the judge and all counsel in the case, at which petitioner was not present.

Then, the jury was recalled, the court reconvened, and the record was made which, twice already set out at length, need not be repeated. And in that setting the closing argu-

ments were made and the judge's charge to the jury was imparted. The verdict was returned promptly on the following morning and was followed in rapid succession and on the same day by the preparation, filing, submission and denial of the motion for a new trial and the pronouncement of the judgment of guilt and sentence of death.

And the steps just recounted were succeeded in due order by the appellate proceedings already noted.

Mr. Fisher's manipulation of the pants belt and the wooden dowel may hardly be characterized too sternly. It was a furtive, dishonest, unprofessional act, inevitably designed to distort a critical bit of evidence, to the supposed advantage of his client and to the confusion of the prosecution. It was, by its very nature, intended to induce the [fol. 185] jury or some of its members to believe that that item was a thing materially different from what it had been when it was brought into court and presented and received in evidence. As Mr. Fisher must certainly have been aware, the acknowledgment or proof of guilt of such conduct by a member of the bar in the course of a contested trial of a proceeding in court would subject such a miscreant to punishment for contempt of court or to professional discipline, even including permanent disbarment from the practice of law, to say nothing of other possible sanctions. It was with a consciousness of those harsh possibilities that he found himself overtaken in his transgression by one of the attorneys engaged in the trial against him of the case, and was, thereupon, taken unwillingly into the inquisition before the judge and his own professional associate and adversaries.

From that ordeal in chambers, Mr. Fisher emerged manifestly beaten and crushed. What immediately ensued leaves no doubt on that score. For the state's special prosecutor, eager for the kill, and with his wounded victim all too plainly acquiescent, at once set the stage and in the presence of the jury that was so shortly to pass on the petitioner's guilt and right to continue to live, recounted, and made Mr. Fisher to admit, the latter's shameful act. And Mr. Fisher

readily acknowledged it with only a minor haggling over a single word, and that, in the circumstances, not really important. Nor can it be forgotten that this occurred in the presence and with the ostensible approval, however reluctantly given, of the trial judge, a matter of no little significance to the jury.

While it has been argued on the present submission that only petitioner's own counsel, not provided by the state but employed by his father in his behalf, trangressed, and the State of Nebraska was without fault, there is no virtue in that position. It can hardly have been advanced sincerely. [fol. 186] For, once Mr. Fisher had been overtaken in his misconduct, Mr. Clarke, who appeared and prosecuted specially for the State of Nebraska and, therefore, acted in its behalf, became the aggressor and, with studied and much too evident purpose, turned Mr. Fisher's wrong into an incident dramatically publicized in the jury's presence, to Mr. Fisher's humiliation and disgrace and petitioner's immense peril. It does not lie now with the State of Nebraska smugly and falsely to exclaim "Shake not thy gory locks at me, nor say I did it". Moreover, the position of the state is not wholly clear, insofar as it is rooted in the action of the trial judge. He presided over the trial, including the dragging of the errant Mr. Fisher before the jury. And he may not be wholly absolved from responsibility for the record that was then made. It is true that he was confronted with a hard choice for whose precipitation he was not at all responsible. But, whether from the standpoint of the special prosecutor or from that of the trial judge, the loss of two weeks of valuable trial time, even the hazard of the erection of a double jeopardy defense or any other allowable alternative, might well have been preferred to that which actually was done to the already hard pressed petitioner.

In that instant and by that display, what had theretofore been an orderly trial was perverted into a virtual legal lynching. From that time forward, Mr. Fisher stood discredited before the jury in respect of petitioner's case. The argument he was shortly to make was stripped of its per-

suasiveness and effectively damned in the jury's estimation; for his acknowledged trickery would rise at every turn to plague him and to nullify his contentions. More directly to the point, petitioner's case itself was discredited. For implicit in the brief but startling exposure before the jury of Mr. Fisher's wrongdoing was an admission that the defense was so devoid of merit as to need gross deception and [fol. 187] falsification of the evidence for its support. And it was in that sordid atmosphere that the closing arguments were made, the instructions were given and the case was submitted to the jury for its deliberation.

It could not, of course, be demonstrated with finality that the verdict was necessarily controlled by that incident. But by the teaching of the authorities upon the point, vide infra, it need not be so demonstrated.

The constitutional right of a defendant charged with the commission of a felony, especially of a capital offense, to be effectively represented in his trial by counsel has been vindicated by many authoritative judicial opinions, of which only a few need now be cited. This right unquestionably exists in prosecutions conducted in the United States Courts. Johnson vs. Zerbst, 304 U. S. 458; Glasser vs. United States, 315 U. S. 60; United States vs. Hayman, 342 U. S. 205; Craig vs. United States (6 cir.), 217 F. (2) 355. It is no less valid and imperatively to be protected as a minimal requirement of due process of law under the fourteenth amendment of the Constitution of the United States in prosecutions in the courts, and for the violation of the criminal laws, of the several states. Powell vs. Alabama, 287 U. S. 45; Hawk vs. Olson, 326 U. S. 271. Many other cases might, but need not, be cited to substantially like effect.

Emphasis is properly placed in the opinions upon the requirement that the assistance of counsel be effective. It is not enough that a defendant be ostensibly represented by an attorney in his trial. It is necessary that no situation be created or allowed to exist which serves to nullify, or materially to impair, the reality of the representation which appears to have existed. Thus, the practical denial to

counsel, provided and otherwise competent, of adequate time to prepare for trial is sufficient to destroy the effectiveness of counsel, Hawk vs. Olson, 326 U. S. 271, as is also [fol. 188] a practical uncertainty respecting the procurement and status of counsel. Powell vs. Alabama, supra. And especially destructive of the real worth of counsel is the existence of any situation which may well be considered to destroy or impair the undivided loyalty and dedication of counsel to his client's cause. Glasser vs. United States, supra; United States vs. Hayman, supra. And it has to be remembered that on his being overtaken by Mr. Quigley in his gross professional misconduct, Mr. Fisher was consciously exposed to the destruction of his career as an attorney, as well as to possible criminal sanctions. Vigor thereafter in the pressure of his client's cause might easily have resulted to his disadvantage, even though it was by no means certain or highly probable that his cooperation with the prosecution would be effective to avert from him the wrath which he deserved. But he patently chose the way of cooperation.

Glasser vs. United States, supra, although admittedly distinguishable from the present proceeding in some phases of their respective settings, is, nevertheless, highly instructive to federal trial courts faced with this court's present task. Glasser was a skilled and experienced lawyer. For several years he had been a trial lawyer as an assistant United States Attorney in a metropolitan district. Along with another attorney similarly situated named Kretske, and a lawyer engaged in private practice, and certain other men, he was indicted in his own district for conspiracy to defraud the United States of its right faithfully to be represented in its courts. The heart of the charge was the erection of a scheme whereby, for bribes, the government attorneys concerned would be remiss in the performance of their official duty to prosecute persons suspected of violating the federal liquor laws. Besides being a lawyer himself, Glasser had employed and was represented by two other attorneys, [fol. 189] one Callaghan and one Stewart. As the time for trial approached, Kretske's privately employed counsel

asked leave to withdraw. The trial judge then inquired whether Stewart might not be appointed as Kretske's attorney. To that inquiry Stewart responded suggesting a doubt arising out of a possible conflict of interest between Glasser and Kretske, and Glasser, inter alia, said: "I would like to enter my objection. I would like to have my own lawyer representing me". The judge, thereupon, deferred the making of an appointment of counsel and required Kretske's attorney, who desired to withdraw, temporarily to remain in his service. Then, after a short colloquy and during the same session of the court and with Glasser still present, the judge did appoint Stewart to represent Kretske. Of that appointment the writer of the opinion notes simply, "Glasser remained silent. Stewart thereafter represented Glasser and Kretske throughout the trial and was the most active of the array of defense counsel." It may sufficiently be observed that during the trial incidents arose in which it might clearly have been for Glasser's welfare, but to the disadvantage of Kretske, to have Stewart in behalf of Glasser proceed in a certain way. He elected not to do it. Glasser was convicted and sentenced and the Court of Appeals affirmed his sentence. But the Supreme Court reversed the conviction and remanded the case for a new trial. In its opinion the court said in part:

"The guarantees of the Bill of Rights are the protecting bulwarks against the reach of arbitrary power. Among those guarantees is the right granted by the Sixth Amendment to an accused in a criminal proceeding in a federal court 'to have the assistance of counsel for his defense.' 'This is one of the safeguards deemed necessary to insure fundamental human rights of life and liberty,' and a federal court cannot constitutionally deprive an accused, whose life or liberty is at stake, of the assistance of counsel. Johnson vs. Zerbst, 304 U. S. 458, 462, 463. Even as we have held that the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment [fol. 190] of counsel, may so offend our concept of the

basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment, Powell vs. Alabama, 287 U. S. 45, so are we clear that the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired.

"To preserve the protection of the Bill of Rights for hardpressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights. Aetna Insurance Co. vs. Kennedy, 301 U. S. 389; Ohio Bell Telephone Co. vs. Public Utilities Commission, 301 U. S. 292. Glasser never affirmatively waived the objection which he initially advanced when the trial court suggested the appointment of Stewart. We are told that, since Glasser was an experienced attorney, he tacitly acquiesced in Stewart's appointment because he failed to renew vigorously his objection at the instant the appointment was made. The fact that Glasser is an attorney is, of course, immaterial to a consideration of his right to the protection of the Sixth Amendment. His professional experience may be a factor in determining whether he actually waived his right to the assistance of counsel. Johnson vs. Zerbst, 304 U. S. 458, 464. But it is by no means conclusive.

"Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. Speaking of the obligation of the trial court to preserve the right to jury trial for an accused, Mr. Justice Sutherland said that such duty 'is not to be discharged as a matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity.' Patton vs. United States, 281 U. S. 276, 312-313. The trial court should protect the right of an accused to have the assistance

of counsel. 'This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.' Johnson vs. Zerbst, 304 U. S. 458, 465.

"No such concern on the part of the trial court for the basic rights of Glasser is disclosed by the record before us. The possibility of the inconsistent interests of Glasser and Kretske was brought home to the court, but instead of jealously guarding Glasser's rights, the court may fairly be said to be responsible for creating a situation which resulted in the impairment of those rights. For the manner in which the parties accepted the appointment indicates that they thought they were acceding to the wishes of the [fol. 191] court. Kretske said the appointment could be accepted 'if your Honor wishes to appoint him (Stewart),' and Stewart immediately replied: 'As long as the Court knows the situation. I think there is something in the fact that the jury knows we can't control that.' The court made no effort to reascertain Glasser's attitude or wishes. Under these circumstances, to hold that Glasser freely, albeit tacitly, acquiesced in the appointment of Stewart is to do violence to reality and to condone a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused."

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"There is yet another consideration. Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected. Irrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness.

"To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stew-

art as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. Cf. Snyder vs. Massachusetts, 291 U. S. 97, 116; Tumey vs. Ohio, 273 U. S. 510, 535; Patton vs. United States, 281 U. S. 276, 292. And see McCandless vs. United States, 298 U. S. 342, 347. Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel in the defense of an accused by insisting, or indeed, even suggesting, that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the court. . . ."

While procedural steps had a material part in the conclusion reached in United States vs. Hayman, supra, the court there also recognized the necessity of undivided and unimpaired loyalty of counsel to his client's interest during a trial. In that case the defendant's attorney, without defendant's awareness, was also employed as counsel for one of the material witnesses against the defendant.

Recognizing the essentiality to due process of law, in the absence of an actual and understanding waiver, of the availability to petitioner throughout his trial for murder, of the effective assistance of counsel, and the teaching of the reported opinions upon the ingredients of such effective assistance, this court is convinced and concludes that, by [fol. 192] the incident of June 15, 1954 already repetitively reported and discussed, petitioner was deprived of the effective assistance of counsel, in violation of his constitutional right thereto. True, he then had two attorneys. But Mr. Fisher was his chief counsel who had led in his defense. Before the jury he, principally, represented petitioner. Mr. Heelan merely assisted Mr. Fisher. When in the sobering moments immediately preceding the closing arguments he publicly submitted to his officially reported degradation, supra, he also dramatically betrayed petitioner. He did that both by destroying his own effec-

tiveness as an advocate, and by supporting the direct inference that petitioner's cause, so recently supported by Mr. Fisher's base conduct, needed such tactics for its maintenance, and was, therefore, unworthy and invalid. It was a staggering blow from which recovery was impossible and did not occur.

It is now frankly acknowledged that the ruling presently made is premised entirely upon that trial occurrence. All other elements urged upon the court in petitioner's support are appraised as colleteral to it and rather in the nature of "make weight" considerations. These include, a) Mr. Fisher's participation, after his exposure and on the day of the return of the verdict, in the arrangement for the hurried preparation, filing, and submission of, and ruling upon, the motion for a new trial and the imposition on petitioner of the death sentence; b) his preparation of the petition in error with its omission and infirmity already noted; and c) his failure in the State's Supreme Court both to raise at all any question of his own disservice to his client's cause and adequately and vigorously and directly to present the problem of the freedom and voluntariness of petitioner's several statements touching the offense with which he was charged. [fol. 193] Conceivably, any of those other features might have occurred without the background of Mr. Fisher's detected tampering with the pants belt. Any one of them might, under some circumstances, be attributable to professional inattention or incompetence against which, though with certain reservations, society is not obliged to guard a client. All of them in combination do, however, serve to illuminate the court room incident and the debasement which it reflects. They have, therefore, been accorded appropriate consideration, although it is now clearly asserted that they are not the basis of the court's judgment, and that, if they stood alone and were not associated with Mr. Fisher's acknowledgment in open court of his illicit act, they would not have moved the court to the action it now announces.

The denial to petitioner in his trial of the effective assistance of counsel requires the conclusion, which the court now announces, that the "judgment and sentence" in pur-

suance of which respondent holds petitioner in custody is void. Yet, the record before the court clearly discloses that, upon the assumption of the complete invalidity of that judgment and sentence, petitioner is left subject to custody under the information filed by The State of Nebraska in the District Court of Cherry County charging him with the commission of murder in the first degree and to eventual and timely trial under that information. He should not, therefore, be now finally and unconditionally released from custody. On the contrary, the court, in the performance of its statutory duty to "dispose of the matter as law and justice require" Title 28 U.S.C., Section 2243, should a) intercept and permanently enjoin the execution by the respondent of the death sentence heretofore pronounced upon and against defendant, and b) discharge him from the custody of the respondent insofar as such custody is in pursuance of such judgment and sentence, but c) expressly [fol. 194] preserve, and make such discharge dependent on and subject to, the right of The State of Nebraska by its appropriate officer or officers, to take the respondent into, and retain him in, its lawful custody under the information now pending against him in the District Court of Cherry County, Nebraska and to proceed to his eventual and timely trial upon the charge against him made in such information. And that will be the order and judgment of this court herein.

This memorandum shall constitute the findings of fact and conclusions of law in the proceeding. But counsel for petitioner will forthwith prepare and submit to counsel for respondent for examination and approval or suggested amendment or revision, an order and judgment in accordance with the announcement herein made; and upon approval will submit the same to the court for signature and entry; or, upon suggested amendment or revision, will submit the same, together with such suggested amendment or revision, to the court for settlement and signature and entry. The order and judgment shall be so prepared as to speak and be effective, not as of this date, but rather as of the date of its signature and entry.

Dated: June 27, 1957.

[fol. 200] Order and Judgment.

(Filed in U. S. District Court July 29, 1957.)

In the United States District Court for the District of Nebraska.

Loyd Carroll Grandsinger, Petitioner,
No. 0265 vs. Civil
Joseph B. Bovey, Warden, Nebraska State Penitentiary, Respondent.

Now on this 29th day of July, 1957, the above entitled matter came on for final hearing before the Court, upon the Application of Loyd Carroll Grandsinger for a Writ of Habeas Corpus, requesting that he be released and discharged from the detention and restraint of Joseph B. Bovey, the Warden of the Nebraska State Penitentiary, the Order to Show Cause Why the Writ should not be granted, the Return to Order to Show Cause, the Writ, the Return to said Writ, and the oral and documentary evidence presented to the Court upon the hearing had in the case, the arguments of counsel for the Petitioner and the Respondent, and the written Briefs filed by said attorneys, and the Court having heard and considered said matters and being fully advised in the premises, made the findings of fact and conclusions of law contained in the Memorandum Brief filed in this case, and herewith adopts same as a part of its Order and Judgment herein as fully and completely as if recited verbatim herein.

It Is Therefore Considered, Ordered, Adjudged And Decreed By The Court, as follows:

(a) That the judgment and sentence of the District Court of Cherry County, Nebraska, entered on June 16, [fol. 201] 1954, in the case entitled State of Nebraska v. Loyd Carroll Grandsinger; which judgment and sentence ordered and adjudged that the petitioner herein, Loyd Carroll Grandsinger, be confined and restrained and that upon a certain date so fixed for his execution, he be executed and put to death in the manner prescribed by law, is

hereby declared to be unconstitutional, null and void and of no force or effect whatsoever.

(b) That the Death Warrant issued by the Supreme Court of the State of Nebraska on October 29, 1956, commanding the Warden of the Nebraska State Penitentiary to proceed to carry into execution on Friday, December 28, 1956, the aforesaid sentence and judgment of the District Court of Cherry County, State of Nebraska, which sentence and judgment was that petitioner, Loyd Carroll Grandsinger, be put to death, is hereby declared to be unconstitutional, null and void and of no force and effect whatsoever.

(c) That Joseph B. Bovey, Warden of the Nebraska State Penitentiary, and all other officials acting by, for, through or under him, or in the name of or on behalf of the State of Nebraska, be and they and each of them are hereby permanently enjoined and forbidden from carrying out or making any attempt of any kind whatsoever to carry into effect all or any part of the aforesaid unconstitutional, null and void judgment and sentence of the District Court of Cherry County, State of Nebraska, which sentenced the petitioner, Loyd Carroll Grandsinger, to death, pursuant to the said aforementioned trial, verdict, judgment and sentence.

(d) That Joseph B. Bovey, Warden of the Nebraska State Penitentiary and all other officials acting by, for, under, through or for him, or in the name of, or on behalf of the State of Nebraska be and they and each of them are hereby permanently enjoined and forbidden by this Court from [fol. 202] carrying out or making any attempt of any kind or nature whatsoever to carry into execution all or any part of the provisions of said Death Warrant issued on October 29, 1956, by the Supreme Court of the State of Nebraska, ordering that the judgment and sentence of death imposed upon petitioner by the District Court for Cherry County, Nebraska, June 16, 1954, be carried out.

(e) That petitioner, Loyd Carroll Grandsinger, be and he is hereby discharged and released from custody insofar as said custody is had in pursuance of the judgment and

sentence of the District Court of Cherry County, Nebraska, which on June 16, 1954, sentenced petitioner to death.

(f) That petitioner, Loyd Carroll Grandsinger, be and he hereby is discharged and released from custody insofar as said custody is in pursuance of the Death Warrant issued by the Supreme Court of the State of Nebraska on October 29, 1956, ordering the execution of the aforesaid judgment and sentence of the District Court of Cherry County, Nebraska.

(g) That pending further proceedings, to review the order and judgment of this Court, custody of the petitioner, Loyd Carroll Grandsinger, shall be retained by respondent Joseph B. Bovey, Warden of the Nebraska State Penitentiary, or his successor or successors in office, to await the completion of all further proceedings to review the instant order and judgment of this Court.

(h) That within six months after the completion of any review proceedings of the instant order and judgment of this Court and the date when an order and judgment of this Court shall become final, the said Loyd Carroll Grandsinger shall be released from all custody whatsoever under the aforesaid judgment and sentence of the District Court of Cherry County, Nebraska, and the Death Warrant issued by the Supreme Court of the State of Nebraska, unless, [fol. 203] prior to the expiration of said time, proper officials of the County of Cherry or State of Nebraska have proceeded to the trial of petitioner upon the Information now pending against him in the District Court of Cherry County, Nebraska, in which latter event continued custody of petitioner, pending the final result of said trial, is hereby granted and permitted.

That this order and judgment as stated in the Memorandum Opinion filed in this case shall be effective and speak as of the date of the signing and filing of this Order and Judgment, to-wit, July 29, 1957.

s JOHN W. DELEHANT
United States District Judge
(Retired, Serving by Assignment)

Approved as to form:

/s/ C. S. BECK,

/s/ RALPH D. NELSON,

Attorneys for Respondent.

/s/ EUGENE D. O'SULLIVAN, SR.,

/s/ CHARLES H. FLANSBURG,

Attorneys for Petitioner.

[fol. 204] By stipulation counsel for petitioner introduced in evidence Exhibit No. 1 with reference to a portion of the record of the trial in the District Court of Cherry County, Nebraska. The copy of the record contained in this exhibit includes testimony on the second day of the trial pertaining to a belt identified in the trial as Exhibit No. 10, and also includes proceedings had on the tenth day of the trial with reference to the leather pants belt identified as Exhibit No. 10.

[fol. 205] Exhibit No. 1.

In the United States District Court for the District of Nebraska.

Loyd Carroll Grandsinger, Petitioner,
No. 6265. vs. Civil.
Joseph B. Bovey, Warden, Nebraska State Penitentiary, Respondent.

It is stipulated by and between petitioner, through his attorneys, and respondent, through his attorneys, that in the trial of petitioner in the District Court of Cherry County, Nebraska, and during the examination of the second witness for the prosecution, Mr. Robert E. Hamilton, during the morning of the second day of the trial, the fol-

lowing questions and answers were propounded and made and cautionary instructions given to the jury, all within the presence and hearing of the jury:

"Q. Now, in unfastening his trousers did you unfasten his other belt? A. Yes, sir.

Q. And I will ask you if Exhibit No. 10 is that other belt? A. Yes; it is.

Q. And did you examine that at the time?

A. Yes, I did.

Q. And I will ask you if after one careful examination at this time if you can state whether that is or is not the identical belt?

A. Yes; that is the same belt.

Q. Now, did you particularly observe at that time the hole which appears in Exhibit No. 10 immediately or very near the tip of the belt? A. Yes, sir.

Q. And I will ask you if that hole was there at that time? A. It was.

[fol. 206] And what is the fact as to whether it was in the same condition as it now is?

A. It was in the same condition as it is now.

Mr. Clarke: We offer in evidence Exhibit No. 10.

Mr. Fisher: Objected to as incompetent, irrelevant and immaterial and no sufficient foundation laid.

The Court: Overruled.

Mr. Clarke: I am handing Exhibit No. 10 to the jury with the request that it be examined carefully but without any of the jury doing any probing in connection with the hole because we wish to have some further testimony concerning it.

The Court: Yes, you may do that. Just examine the hole and do not probe it with anything."

It is further stipulated and agreed that on the tenth day of the trial, and immediately before the case was submitted to the jury, the following proceedings were had in the presence and hearing of the jury:

"By Mr. Clarke:

Before we proceed with the arguments, Your Honor, there is a matter that has been taken up with, Your Honor, which we wish to get into the record.

The Court: Very well.

Mr. Clarke: We wish the record to show that counsel for the defendant, is willing that it shall show, that this morning in this court room, after the court reporter had brought all the exhibits in the case out and laid them on the reporter's desk, Mr. Fisher, one of the counsel for the defendant, while he was examining Exhibit No. 10, being the leather pants belt heretofore identified as the belt of Marvin Hansen, and that at that time he took a dowel, being one of the wooden dowels on the reporter's desk, and being either the same or one exactly like the one I am holding in my hand, which I will have to have marked as an exhibit, and pushed it violently—

Mr. Fisher: (Interrupting) I didn't violently push it—

Mr. Clarke: (Interrupting) pushed it through the hole in the belt hard enough so that it materially enlarged the [fol. 207] size of the hole to an extent which cannot now be determined and that the belt, Exhibit No. 10, is not now in the same condition as it was when it was offered in evidence and received in evidence, and that the hole is now materially larger than it was before Mr. Fisher did that.

(Mark this dowel as an exhibit, please.)

(The wooden dowel refered to was marked as Exhibit No. 75.)

The Court: Mr. Fisher, as I understand it you have told counsel that you did that?

Mr. Fisher: Yes.

The Court: You recognize that the hole is larger?

Mr. Fisher: Yes.

The Court: The court admonishes all counsel and everyone else and the jury when they go to deliberate upon this matter to not probe these exhibits. They can make comparisons but they cannot probe these belts with any dowel, or change the condition of any exhibits. Very well, you may proceed."

It is further stipulated and agreed that Exhibit 10 was the belt worn by patrolman Hansen at the time he was shot; that the same contained a hole allegedly made by penetration of a bullet; that it was the contention of the State that the size of the hole indicated that it had been made by a 22 caliber bullet, and that the State contended that the defendant, Grandsinger, had had a 22 caliber pistol in his possession at the time of the shooting, and that all officers present at the scene of the shooting carried 38 caliber revolvers or weapons of higher calibration, and that the exact size of the hole appearing in Exhibit 10 was a material fact bearing upon the guilt or innocence of the defendant Grandsinger of the crime of murder for which he was then standing trial.

CHARLES H. FLANSBURY,
EUGENE D. O'SULLIVAN,
Attorneys for Petitioner.

RALPH D. NELSON,
Attorneys for Respondent.

[fol. 208] By stipulation counsel for petitioner introduced in evidence Exhibit No. 2 which includes a copy of a supplemental showing in support of motion for extension of time to prepare bill of exceptions, this showing having been filed by Charles A. Fisher as attorney for petitioner, with the Clerk of the Supreme Court of the State of Nebraska, on November 4, 1954, and which is a part of the official transcript of the proceedings in the Supreme Court of Nebraska.

[fol. 209] Exhibit No. 2.

In the United States District Court for the District of Nebraska.

Loyd Carroll Grandsinger, Petitioner,
No. 0265. vs. Civil.
Joseph B. Bovey, Warden, Nebraska State Penitentiary, Respondent.

Stipulation.

It is stipulated by and between petitioner, through his attorneys, and respondent, through his attorneys, that the three page affidavit of Charles A. Fisher, subscribed and sworn to by him November 2, 1954, photostatic copy of which is attached hereto and by reference made a part of this stipulation, was duly filed by the said Charles A. Fisher, as attorney for petitioner herein, with the Clerk of the Supreme Court of the State of Nebraska on November 4, 1954 in error proceedings then pending in the Supreme Court of the State of Nebraska from the judgment and sentence of the District Court of Cherry County, Nebraska, in the case entitled "Loyd Carroll Grandsinger, Plaintiff in Error vs. The State of Nebraska, Defendant in Error", Supreme Court Docket No. 33663; that the same was accepted for filing by the Clerk of the Supreme Court of the State of Nebraska and appears as a part of the official transcript of the proceedings in the Supreme Court of the State of Nebraska in the aforementioned error proceedings; that at the time of the filing thereof Charles A. Fisher was attorney of record for the petitioner herein and was representing petitioner in the proceedings then pending in the Supreme Court of the State of Nebraska; that Rush C. Clarke, referred to in said affidavit, was special prosecutor for the County of Cherry and State of Nebraska in the proceedings against petitioner in the District Court of Cherry County, Nebraska, and that the said [fol. 210] Rush C. Clarke at all times referred to in said affidavit maintained his home and residence in the City of North Platte, Nebraska, a distance of approximately 140 miles from Valentine, Nebraska, the place of trial of peti-

tioner, and that the said Charles A. Fisher at all times referred to in said affidavit maintained his home and residence in Chadron, Nebraska, a distance of approximately 140 miles from Valentine, Nebraska, the place of trial of petitioner.

CHARLES H. FLANSBURG,

EUGENE D. O'SULLIVAN,
Attorneys for Petitioner.

RALPH D. NELSON,
Attorneys for Respondent.

[fol. 211] **Supplemental Showing in Support of Motion for Extension of Time of Time to Prepare Bill of Exceptions.**

In the Supreme Court of Nebraska.

Loyd Carroli Grandsinger, Plaintiff in error,
No. 33663. vs.
The State of Nebraska, Defendant in error.

State of Nebraska,
Dawes County,—ss.:

Charles A. Fisher, attorney for plaintiff in error, being on oath first duly sworn, deposes and says: That the special attorney for the State in the trial of this case in the District Court, stated that in event the Court reporter needed additional time in which to prepare the Bill of Exceptions that he Rush Clarke the Special Prosecutor would agree that this should be granted and that the Attorney General's Office would go along in the matter. That this agreement as to possible extension of time was made because of the fact that plaintiff in error, then defendant in the District agreed to the ruling on motion for new trial on the 16th of June, 1954 the day of the filing of the motion and day verdict was returned by the Jury. That it was then known by the Special Prosecutor, the County Attor-

ney, the attorney for defendant (now plaintiff in error) the District Judge and the Court Reporter, that the Court Reporter would not be able to get the Bill of Exceptions out timely, if motion for new trial was ruled on, on the 16th of June, 1954. That because of the agreement of the parties the Court did rule on it on June 16th, 1954, but only on the understanding that the Court Reporter would have all the time necessary to prepare the Bill of Exceptions: That the following is a copy of the letter written by Hon. Rush C. Clarke, the Special Prosecutor to the Attorney General Hon. C. S. Beck, and copies of which were sent to Hon. E. L. Meyer, District Judge, Hon. W. B. Quigley, County Attorney, Cherry County, Valentine, Nebraska, and Charles A. Fisher, attorney, Chadron, Nebraska, to-wit:

"

July 25, 1954

Hon. C. S. Beck,
Attorney General
Capitol Building,
Lincoln 9, Nebraska

[fol. 212] Re: Grandsinger vs. State.

Dear Kent:

In connection with this case, which is a murder case from Cherry County, I wish to call your attention to the following:

The jury brought in a verdict of guilty and Mr. Fisher filed a motion for new trial. He did not feel it was worth while to argue the motion for new trial since everything had been pretty well argued out during the course of the trial. There was talk however of letting the matter or ruling on the motion for new trial go over for several weeks. I learned that the only reason for this was that the court reporter was going to need more time than he would otherwise get in which to prepare the Bill of Exceptions, since the court reporter is snowed under with work.

Since this was the only reason for a suggested delay, I, in order to avoid the necessity of having to come back to

Valentine and avoiding the expense and trouble to the Judge and to Mr. Fisher and everybody else, volunteered the suggestion that I would almost be willing to guarantee that under the circumstances the Attorney General would make whatever stipulations might be necessary in the Supreme Court to extend the time for settling the Bill of Exceptions. Accordingly, on that assurance, Mr. Fisher

—2*

agreed that the motion for new trial might be submitted to the court on that same day. This was done and the man was sentenced and the case was closed as far as the District Court is concerned.

I am sure that Judge Meyer would have held up the matter of disposing of the motion for new trial had it not been for my unauthorized action in making promises on your behalf.

This is all hearsay with me but I understand the law is now that after a certain length of time only the Supreme Court can grant an extension of time for settling the Bill of Exceptions. Undoubtedly it will be necessary for Mr. Fisher to make an application of such an extension. If he desires that I do so I will of course make an affidavit as to the foregoing matters.

I sincerely hope that you will have no objection to going along with Mr. Fisher when and if he makes an application for extension of time. In the long run no time will be lost and considerable expense to both the state and Cherry County will have been avoided.

Thanking you, I am

Respectfully yours,

2/ab RUSH C. CLARKE.

cc—Hon. E. L. Meyer,
District Judge
Alliance, Nebraska

cc—Mr. Charles Fisher, Attorney
Chadron, Nebraska

cc—Hon. W. B. Quigley
County Attorney
Valentine, Nebraska

Trans: 7/26/54

That attorney for the plaintiff in error, would not have consented to, nor have filed the motion for new trial on the 16th of June, 1954, if it had not been understood by him, [fol. 213] and agreed to by the County Attorney of Cherry County, Nebraska, W. B. Quigley, the Special Prosecutor for the State of Nebraska, Rush C. Clarke, which agreement was approved by the Hon. E. L. Meyer, District Judge, that the overruling of the motion for new trial, would not deprive the Court Reporter of all the time he needed to prepare the Bill of Exceptions in this matter. That attorney for plaintiff in error did file the motion for new trial on the 16th of June, 1954, and permit a ruling on the same on that date only because it was understood and agreed that this would not speed the matter up or make it so that the Court Reporter Could not get out the Bill of Exceptions, and it would now be depriving the plaintiff in error of a substantial right and deprive him of his right to a full review it time is not granted in which to prepare and settle the Bill of Exceptions in this matter. That attorney for the plaintiff in error, has been diligent and it is through no fault of plaintiff in error, or his attorney that the Bill of Exceptions has not been prepared herein.

Wherefore, plaintiff in error again prays for additional time in which to prepare and settle the Bill of Exceptions herein.

Dated at Chadron, Nebraska, this 2nd of November, 1954.

LOYD CARROLL GRANDSINGER,
Plaintiff in Error.

By Charles A. Fisher,
His Attorney.

Subscribed in my presence and sworn to before me this 2nd of November, 1954, by Charles A. Fisher.

TOMMY LEEKER,
Notary Public.

My commission expires April 30, 1958.

[fol. 214] Counsel for petitioner introduced in evidence Exhibit No. 3, a photostatic copy of the motion for new trial filed on [behlaf] of Loyd Carroll Grandsinger with the District Court of Cherry County, Nebraska, [as] the conclusion of the trial.

[fol. 215] Exhibit No. 3.

Motion for New Trial.

In the District Court of Cherry County, Nebraska.

The State of Nebraska, Plaintiff,
vs.
Loyd Carroll Grandsinger, Defendant.

Comes now the defendant by his attorneys William C. Heelan, and Charles A. Fisher, and moves the Court for a new trial and to set aside and vacate the verdict of the jury in this case for each and all of the following good and sufficient reasons:

1. Irregularity in the proceedings of the Court, the Special Prosecutor, and the County Attorney, and of the witnesses for the State, orders of the Court, abuse of discretion by the Court by which the defendant was prevented from having a fair trial.

2. Misconduct of the jury.

3. Misconduct of the Special Prosecutor.

4. Misconduct of the County Attorney.

5. Misconduct of witnesses for the State.

6. Accident and surprise which ordinary prudence could not have guarded against.

7. The verdict is not sustained by sufficient evidence.

8. The verdict is contrary to the evidence.

9. Newly discovered evidence material to the defendant which could not with reasonable diligence have been discovered by the defendant and produced at the trial.

10. Error of law occurring at the trial.

11. Error in the admission of evidence for the state.

12. Error in the rejection of evidence.

13. The Court erred in failing to sustain motions for mistrial made from time to time by the defendant during the course of the trial.

[fol. 216] 14. The Court erred in failing to sustain defendant's motion for directed verdict made at the close of the state evidence as to first degree murder.

15. The Court erred in failing to sustain the defendant's motion for directed verdict made at the close of state evidence in chief as to murder in the second degree.

16. The Court erred in failing to sustain defendant's motion for directed verdict made at close of State's case in chief as to manslaughter.

17. The Court erred in giving instruction No. 1.

18. The Court erred in giving instruction No. 2.

19. The Court erred in giving instruction No. 3.

20. The Court erred in giving instruction No. 4.

21. The Court erred in giving instruction No. 5.

22. The Court erred in giving instruction No. 6.

23. The Court erred in giving instruction No. 7.

24. The Court erred in giving instrutcion No. 8.

25. The Court erred in giving instruction No. 9.

26. The Court erred in giving instruction No. 10.

27. The Court erred in giving instruction No. 11.

28. The Court erred in giving instruction No. 12.

29. The Court erred in giving instruction No. 13.

30. The Court erred in giving instruction No. 14.

31. The Court erred in giving instruction No. 16.

32. The Court erred in giving instruction No. 15.

33. The Court erred in giving instruction No. 17.

34. The Court erred in giving instruction No. 18.

35. The Court erred in giving instruction No. 19.

36. The Court erred in giving instruction No. 20.

37. The Court erred in giving instruction No. 21.

38. The Court erred in giving instruction No. 22.

39. The Court erred in giving instruction No. 23.

[fol. 217] 40. The Court erred in giving instruction No. 24.

41. The Court erred in giving instruction No. 25.

42. The Court erred in giving instruction No. 26.

43. The Court erred in giving instruction No. 27.

44. The Court erred in giving instruction No. 28.

45. The Court erred in giving instruction No. 29.

46. The Court erred in failing to give instruction No. 1, requested by the defendant.

47. The Court erred in failing to give instruction No. 2, requested by the defendant.

48. The Court erred in failing to give instruction No. 3, requested by the defendant.

49. The Court erred in failing to give instruction No. 4, requested by the defendant.

50. The Court erred in failing to give instruction No. 5, requested by the defendant.

51. The Court erred in failing to give instruction No. 6, requested by the defendant.

52. The Court erred in failing to give instruction No. 7, requested by the defendant.

53. The Court erred in failing to give instruction No. 8, requested by the defendant.

54. The Court erred in failing to give instruction No. 9, requested by the defendant.

55. The Court erred in failing to give instruction No. 10, requested by the defendant.

56. The Court erred in failing to give instruction Noll, requested by the defendant.

57. The Court erred in failing to give instruction No. 12, requested by the defendant.

58. The Court erred in failing to give instruction No. 13, requested by the defendant.

[fol. 218] 59. The Court erred in failing to give instruction No. 14, requested by the defendant.

60. The Court erred in failing to give instruction No. 15, requested by the defendant.

61. The Court erred in failing to give instruction No. 16, requested by the defendant.

62. The Court erred in failing to give instruction No. 17, requested by the defendant.

63. The Court erred in failing to give instruction No. 18, requested by the defendant.

64. The Court erred in failing to give instruction No. 19, requested by the defendant.

65. The Court erred in failing to give instruction No. 20, requested by the defendant.

66. The Court erred in failing to give instruction No. 21, requested by the defendant.

68. The Court erred in failing to give instruction No. 22, requested by the defendant.

69. The Court erred in failing to give instruction No. 23, requested by the defendant.

70. The Court erred in failing to give instruction No. 24, requested by the defendant.

71. The Court erred in failing to give instruction No. 25, requested by the defendant.

72. The Court erred in failing to give instruction No. 26, requested by the defendant.

73. The Court erred in failing to give each and every instruction requested by the defendant, and this specification is made to the Court's refusal to give each and every instruction requested by the defendant, and this specification is made separately to each instruction so refused by the Court.

Dated at Valentine, Nebraska, this 16th day of June, 1954.

[fol. 219] LOYD CARROLL GRANDSINGER,
Defendant.

By W. C. Heelan,
Charles A. Fisher,
Loyd Carroll Grandsinger.

The State of Nebraska
Cherry County
Received & Filed
Jun. 16, 1954

Ben F. Wilkinson,
Clerk of District Court.
By James Sheets, Deputy.

[fol. 220] Counsel for petitioner introduced in evidence Exhibit No. 4, a photostatic copy of the petition in error filed with the Clerk of the Supreme Court of the State of Nebraska in the proceedings of Loyd Carroll Grandsinger, plaintiff in error, versus State of Nebraska, defendant in error.

[fol. 221] Exhibit No. 4.

Petition in Error.

In the Supreme Court of Nebraska.

Loyd Carroll Grandsinger, Plaintiff in Error,
vs.
The State of Nebraska, Defendant in Error.

Comes now Loyd Carroll Grandsinger, petitioner in error by William C. Heelan and Charles A. Fisher, his attorneys, and shows to the Court that from the 2nd of June 1954 to the 16th of June, 1954 he was tried before the Court and Jury in the District Court of Cherry County, Nebraska, and convicted of murder in the first degree; that within time required by law he filed a motion for new trial, which was overruled by the District Court on the 16th day of June 1954, at which time petitioner was sentenced to death, and date of execution was fixed as October 15th, 1954. That error intervened in the proceedings and trial of said case in the District Court in the following particulars:

1. The trial court erred in admitting on behalf of the state incompetent, irrelevant and immaterial and prejudicial evidence over the objection of the petitioner.

2. The court erred in excluding competent, relevant, material and proper evidence offered by the petitioner.

3. The trial court erred in giving instruction No. 1 on its own motion

4. The trial court erred in giving instruction No. 2.

5. The trial court erred in giving instruction No. 3.

6. The trial court erred in giving instruction No. 4.

7. The trial court erred in giving instruction No. 5.

8. The trial court erred in giving instruction No. 6.

9. The trial court erred in giving instruction No. 7.

10. The Trial court erred in giving instruction No. 8.

11. The trial court erred in giving instruction No. 9.

12. The trial court erred in giving instruction No. 10.

13. The trial court erred in giving instruction No. 11.

14. The trial court erred in giving instruction No. 12.

[fol. 222] 15. The trial court erred in giving instruction No. 13.

16. The trial court erred in giving instruction No. 14.

17. The trial court erred in giving instruction No. 15.

18. The trial court erred in giving instruction No. 16.

19. The trial court erred in giving instruction No. 17.

20. The trial court erred in giving instruction No. 18.

21. The trial court erred in giving instruction No. 19.

22. The trial court erred in giving instruction No. 20.

23. The trial court erred in giving instruction No. 21.

24. The trial court erred in giving instruction No. 22.

25. The trial court erred in giving instruction No. 23.

26. The trial court erred in giving instruction No. 24.

27. The trial court erred in giving instruction No. 25.

28. The trial court erred in giving instruction No. 26.

29. The trial court erred in giving instruction No. 28.

30. The trial court erred in giving instruction No. 29.

31. The trial court erred in giving each and every instruction given by trial court on its own motion.

32. The court erred in refusing to give instruction No. 1, requested by the defendant and petitioner in error.

33. The court erred in refusing to give instruction No. 2, requested by petitioner in error.

34. The court erred in refusing to give instruction No. 3, requested by petitioner in error.

35. The court erred in refusing to give instruction No. 4, requested by petitioner in error.

36. The court erred in refusing to give instruction No. 5, requested by the petitioner in error.

37. The court erred in refusing to give instruction No. 6, requested by the defendant, petitioner in error.

38. The court erred in refusing to give instruction No. 7, requested by the petitioner in error.

39. The court erred in refusing to give instruction No. 8, requested by the petitioner in error.

40. The court erred in refusing to give instruction No. 9, [fol. 223] requested by petitioner in error.

41. The court erred in refusing to give instruction No. 10, by petitioner in error.

42. The court erred in refusing to give instruction No. 11, requested by the petitioner in error.

43. The court erred in refusing to give instruction No. 12, requested by the petitioner in error.

44. The court erred in refusing to give instruction No. 13, requested by the petitioner in error.

45. The court erred in refusing to give instruction No. 14, requested by the petitioner in error.

46. The court erred in refusing to give instruction No. 15, requested by the petitioner in error.

47. The court erred in refusing to give instruction No. 16, requested by the petitioner in error.

48. The court erred in refusing to give instruction No. 17, requested by the petitioner in error.

49. The court erred in refusing to give instruction No. 18, requested by the petitioner in error.

50. The court erred in refusing to give instruction No. 19, requested by the petitioner in error.

51. The court erred in refusing to give instruction No. 20, requested by the petitioner in error.

52. The court erred in refusing to give instruction No. 21, requested by the petitioner in error.

53. The court erred in refusing to give instruction No. 22, requested by the petitioner in error.

54. The court erred in refusing to give instruction No. 24, requested by petitioner in error.

55. The court erred in refusing to give instruction No. 25, requested by petitioner in error.

56. The court erred in overruling motion for new trial.

57. The court erred in overruling motion for directed verdict at close of State's case as to murder in the first degree.

58. The court erred in overruling motion for directed [fol. 224] verdict at close of State's case as to murder in the second degree.

59. The court erred in overruling motions for directed verdict of not guilty as to murder in the first degree murder in the second degree and manslaughter, made at the close of the State's case.

60. Misconduct of the County Attorney and the Special Prosecutor for the State, prejudicial to petitioner in error and by which he was deprived of a fair trial and which was objected to by petitioner in error.

61. The court erred in overruling the several motions for mistrial made by defendant petitioner in error and this specification is made to each motion for mistrial made by petitioner in error, and which the trial court overruled.

62. The verdict was not sustained by sufficient evidence.

63. The verdict is contrary to the evidence.

64. The verdict is contrary to law.

65. Other error of law occurring at the trial and duly excepted to by petitioner in error.

66. The court erred in orally instructing the jury as to the law during the course of the trial.

67. The court erred in the reception of so called rebuttal evidence that was not in fact rebuttal, but was introduced for sole purpose of appealing to the passion and prejudice of the jury.

68. Misconduct of the jury.

69. Misconduct of witnesses for the State.

70. Accident and surprise which ordinary prudence could not guarded against.

71. Irregularity in the proceedings of the Court, jury, the prevailing party, and orders of the court, and abuse of discretion by the court by which petitioner in error was prevented from having a fair trial.

72. Newly discovered evidence, material for the defendant petitioner in error, which he could not with reasonable diligence have discovered and produced at the trial.

The petitioner calls attention to the transcript of the [fol. 225] proceedings in the District Court and the Bill of Exceptions in support of his petition in error.

Petitioner respectfully applies for suspension of sentence herein until this matter can be heard in this court, and that a Writ of Error be issued by the Supreme Court of Nebraska as provided by Section 29-2306 and 29-2307 Revised Statutes of Nebraska.

Dated this 19th day of July, 1954.

LOYD CARROLL GRANDSINGER,
Petitioner in Error.

WILLIAM C. HEELAN,
By Charles A. Fisher,
His Attorneys.

[fol. 226] Counsel for Petitioner introduced in evidence Exhibit No. 5, a true copy of the original brief filed by Charles A. Fisher as sole attorney of record for Loyd Carroll Grandsinger with the Supreme Court of Nebraska in the error proceedings, Exhibit No. 6, entitled "Supplemental and Reply Brief" filed by Charles A. Fisher as sole attorney of record for Loyd Carroll Grandsinger with the Supreme Court of Nebraska, and Exhibit No. 7 entitled "Motion for Rehearing and Brief in Support Thereof" filed by Charles A. Fisher as sole attorney of record for Loyd Carroll Grandsinger with the Supreme Court of Nebraska. It was stipulated that Exhibits No. 5, No. 6 and No. 7 constitute all of the briefs filed by attorney Charles A. Fisher in the Supreme Court of Nebraska in the error proceedings then pending.

[fol. 227] Loyd Carroll Grandsinger, the petitioner, testified:

I was born in Valentine, Nebraska, on August 28, 1932. My folks lived on a farm in South Dakota. I attended country school for seven years, and then I went to school at Colome, South Dakota, where I completed the ninth grade, but I didn't finish the tenth grade. In 1954, I was living in Bell Gardens, a suburb of Los Angeles, California, and an older brother, Leon, was then also living in Los Angeles. About Saturday, April 3, 1954, Leon and I left California for Nebraska, going by way of Las Vegas, across Wyoming, and on to Hot Springs, South Dakota. We had just the one car until we got to Wyoming, and then we had another car. We went through Springview, Nebraska, and on to the Fredericksons on Wednesday, April 7, 1954. During that night, Leon and I went to Wewela, South Dakota, a town two miles north of the Nebraska-South Dakota line. This is the place where I testified about a burglary of a post office and a store, which were all in one building. Leon and I came back to Nebraska on the morning of Thursday, April 8, 1954, going first to see the Fredericksons and then to see Fritz Brandenburg, who lived just north of the

Niobrara river, south of Sparks, in Cherry County, Nebraska. The location of Fritz Brandenburg's home is shown on Exhibit No. 10 with an "X". I ate a late noon meal at Fritz Brandenburg's, slept for a couple hours, and left there about 4 o'clock that afternoon. From there Leon and I went back to the Fredericksons. We left there that night, with Leon driving a 1953 Ford towing a 1941 Ford driven by me, proceeding on Highway 7 in Cherry County, Nebraska. We were stopped on that highway in Cherry County, between the Kewanee school and the Berry bridge, at about 11:30 p.m. I am familiar with that area. As highway 7 proceeds east of Valentine, the Niobrara river crosses the highway about 12 miles east of Valentine, and that is the location of the Berry bridge. Highway 7 continues on north from the bridge, and the Kewanee school is located [fol. 228] where the highway then turns to the east, a matter of 2 or 3 miles from the bridge. Leon and I were stopped in the area designated with a "Y" on Exhibit No. 10, with the bottom of the "Y" being about the spot where I believe we were stopped. I saw a car coming behind me which had a red light on the bumper. There was a gun in my car which belonged to Lester Lynn. I got out of my car on the right hand side, a man was in back of my car, and after I had stopped and started to walk toward him he shot at me and I ran. I ran away from my car that night in fear. When it got light enough so that I could see, after wandering around in fear, physically exhausted, I found my way to the Niobrara river. I would suggest that it became light about 4:30 a.m. Later I saw a bridge, and I knew principally where I was, and I knew that I was in the area of Fritz Brandenburg's again. On that day, Friday, April 9, 1954, I stayed in a clump of buck brush for several hours. I was finally picked up about 3:00 p.m., when Fritz Brandenburg pulled me out of icy waters of the Niobrara river, and took me to a road where there were several patrolmen. I was then handcuffed, a restraining belt was put around me, and I was placed in a car of the highway patrolman driven by an officer named Cochran, and taken to the court house at Valentine. On the way we stopped at the school house, and Sheriff William Freeman

got in the car and sat in the front seat on the right hand side, and I was in the middle. I was taken to the back door of the court house at Valentine, and into the chambers of the district judge. Exhibit No. 8 is a true photostatic copy of the statement I signed that night at the court house, and this statement was Exhibit No. 19 in the trial in the district court of Cherry County, Nebraska. I did not make the check marks appearing at the end of the answers, but my signature is on the bottom of each page.

Saturday, April 10, 1954, I was taken to the scene where the shooting of the patrolman is supposed to have happened, in the area I marked on the map identified as Exhibit No. 10, about 12 miles east of Valentine, and I was questioned there. I did my best to place the cars in the location where they had been the night before. I placed one car [fol. 229] in the position where Leon's car had been, and another car where my car had been. I also placed another car on the other side of the road representing the sheriff's car. I also placed the position of Sheriff Freeman and Patrolman Hansen as I had seen them.

Sunday evening, April 11, 1954, I was questioned by Mr. Reis, a Post Office Inspector, and by Sheriff Shoemaker from Winnier, South Dakota. Mr. Reis told me that he wanted to talk to me about what had happened in South Dakota, and said that he was investigating a post office burglary and a store burglary in Wewela, South Dakota. A written statement was typed up by Mr. Reis. Exhibit No. 9 is a true photostatic copy of this statement signed by me as prepared by Mr. Reis, and this statement was Exhibit No. 25 in the criminal prosecution in Valentine, Cherry County, Nebraska, in which I was the defendant. I believed that the statement covered only the post office burglary and the store building burglary which was in the same building. I did not make the check marks at the end of the sentences.

On Monday, April 12, 1954, I appeared in the County Court of Cherry County, Nebraska, and the County Attorney, Mr. Quigley, read a long list of charges to me. He didn't say anything about an attorney, but told me to plead

not guilty, and I did. At the trial in the district court of Cherry County, Nebraska, I testified that Mr. Quigley said "You plead any way you want, guilty or not guilty, but your case, you plead not guilty, which you will, isn't that right?" and I said "Yes." I do not know what a preliminary hearing is, and when I was in county court I heard nothing said about waiving a preliminary hearing. I had never been in a trial before, or in proceedings where there was going to be a trial, but I had been in court before and plead guilty.

On Wednesday, April 14, 1954, I saw Mr. William C. Heelan of Valentine, Nebraska, one of the attorneys obtained for me by my father. The other lawyer obtained for me by my father was Mr. Charles A. Fisher of Chadron, Nebraska. Mr. Fisher actually conducted the trial as trial counsel and made the argument to the jury. Mr. Heelan did [fol. 230] not represent me in the Nebraska Supreme Court because of his death.

I was present in the court room on the day arguments were made to the jury. Before the jury entered the jury box or the court had taken the bench, I was sitting at the counsel table with Mr. Heelan, and Mr. Fisher had walked over and was looking at some of the exhibits on the reporter's desk, with his back to me. I didn't see what he was doing. At the time I don't recall watching him very closely except that he was in my line of vision, and the first time I noticed was Mr. Clarke, who was sitting there, come flying through the door out of the judge's chamber and grabbed hold of him and spun him around and took a belt and a dowel stick away from him. Then Mr. Quigley, the County Attorney, came out and they both took Mr. Fisher by the arms and took him into the judge's chambers. A few minutes later they all came out and Mr. Fisher came over to the table. They called for the jury and the judge who took his position and the record was made you have there. Mr. Clarke talked right to the jury. He stood right before them and made the record. He had the belt in one hand and the dowel in the other, and at the place where he said Mr. Fisher did it violently, he showed the jury how he had

done it by crossing his arms forcibly. After Mr. Fisher came out of the judge's chamber and came over to the table, he said "Clarke would like to burn me, too." A few minutes later I changed seating arrangements. I was sitting between the two men, and I changed seats with Mr. Heelan, and I heard Mr. Fisher tell Mr. Heelan that he was about to be cited for contempt of court. After the jury's verdict was brought in, I was taken into the jury room by the sheriff and I conferred with my family for about ten minutes. Then I was taken back to jail, and left there until I was called up about noon or a little after noon and sentenced. I had not seen Mr. Fisher during this time, and I did not know whether a written motion for a new trial had been filed on my behalf. I did not consent to having that motion heard and ruled on that same day, and I did not know what a motion for a new trial was.

Exhibit No. 8.

[fol. 231] EXHIBIT NO. 19
Lowell D. Widler Official Court Reporter
Sixteenth Judicial District in and
for Cherry County, Nebraska
Case No. ..... Docket ..... Page
Date ..... Witness .....
Title of Case .....
..... Plaintiff
..... Defendant

Statement of Loyd Grandsinger

Taken at Valentine, Nebraska, on April 9th, 1954, between the hours of 3:30 P.M. and 5:00 P.M. Questions by Lt. L. E. Knudtson of the Nebraska Safety Patrol and Jack Knudtson.

I, Loyd Carroll Grandsinger, make the following voluntary signed statement to Lt. L. E. Knudtson and Jack Knudtson, who have identified themselves to me as a Lieutenant of the Nebraska Safety Patrol and Jack Knudtson is a druggist in Gordon, Nebraska. No threats or promises have been made to me to get me to make this statement. I have been advised that I do not have to make a statement and I know anything I say can be used against me in a court of law.

I am 21 years of age, being born August 28, 1932, at Valentine, Nebraska. I have been residing in Bell Gardens, California, which is a suburb of Los Angeles, since January of 1954. I was employed by Catalina, Inc. as a receiving clerk. I have a 10th grade education and can read and write. I left California last Saturday, April 3, 1954. My brother, Leon, left with me. I had quite a bit of trouble with my car on the way through. My intention of coming back here was trouble with my wife. I thought maybe it would be best to get away for a while and maybe I could straighten things out between us. I came back here planning on getting work. I had been laid off my job about two weeks previous to that time. I put all my miscellaneous stuff I didn't want to carry with me in Lester's house trailer. I took a gun from Lester's trailer house. Leon and I got in the car and left from there and started back. The car was not in good shape so we didn't travel fast. We had trouble with it so at various times we did work on it. Finally it was completely about shot. It would run but that is about all you could say for it.

Q. When you left California, how many guns did you have? A. That is all.

Q. As you travelled on east from California, did you acquire another gun? A. No.

Q. Did you acquire another automobile?

A. Not personally, no. I drove my own automobile.

Q. Where did you get the second gun?

A. I don't know where it came from.

[fol. 232] Q. Where did you first see the gun?

A. I think in this automobile.

Q. What automobile?

A. The one that was taken in Wyoming.

Q. What kind of a car is that?

A. 52 or 53 Ford.

Q. What color? A. Gray, I believe, or blue.

Q. Did it have a license plate on it when you got it?

A. Yes.

Q. Do you know any of the numbers on the license plate? A. No.

Q. Do you know what state it was licensed in?
A. Wyoming.
Q. What town in Wyoming did you get the car from?
A. I don't know.
Q. What highway did you drive on at that town?
A. 287, I believe, I couldn't be sure.
Q. Was it near any large town, say Cheyenne, Wyoming?
A. It was not too far from Cheyenne, about 90 or a 100 miles.
Q. Was it Rock Springs?
A. No, it was west of Cheyenne approximately 100 miles or so.
Q. Will you go ahead and describe how you came into possession of this blue 52 or 53 Ford?
A. The occupants of the car was obviously stuck on the road with another auto that didn't run without towing, pushing or pulling. Somebody's remarks was brought up and it was done.
[fol. 233] Q. Who did it? Did you take the car?
A. No.
Q. Who did? A. I wouldn't say?
Q. Did you shoot Patrolman Hansen, did you shoot a highway patrolman out here last night?
A. I guess I must have, I don't know.
Q. What kind of a gun were you carrying?
A. I had a 22.
Q. What make?
A. I don't know what make it was.
Q. Was it an automatic pistol or a cylinder type?
A. It was a cylinder type.
Q. How many shells would it hold?
A. Eight or nine.
Q. Did you shoot the gun at an officer last night?
A. No.
Q. Are you sure you didn't?
A. I shot when I fell over the bank and then I heard a lot of shots. There was shots when I was running and I fell over the bank and then I could barely hear shots, a lot of them, and I just kept on running. I never even looked out over the side, I just kept on running.

Q. But your gun did go off when you fell over the bank?

A. Yes, I guess so, I don't know. I just left it.

Q. Left what? A. The gun.

Q. Where?

[fol. 234] A. Under the bank, I guess, I don't know, I just took off.

Q. Did you see this officer chasing you? A. Yes.

Q. How far did he chase you?

A. I don't know just how far it is to the bank but he was getting away to the right side of me and I never saw the bank and fell headlong over the bank.

Q. Had he shot at you up to this time? A. Yes.

Q. Did he holler for you to halt?

A. No, I fell down a couple of times and he told me to get up.

Q. What were you doing with the gun in your hand to start with?

A. It was in the car and I didn't want to get caught with is so I ran. I wanted to throw it away.

Q. Why didn't you throw the gun away as soon as you got out of the car?

A. He was right there by the car.

Q. You didn't want to be arrested and you didn't want to be arrested with a gun on you? A. That's right.

Q. You didn't want to be arrested with a stolen auto, did you? A. No, I did not.

Q. You carry a gun for a purpose, don't you?

A. That wasn't the purpose of my carring that gun, no.

Q. Do you remember the officer's hollering for you to halt when you first started to run?

A. Yes, but he had fired one shot at the ground at my feet before I ever started running. He was standing at the back corner of the car and I was about ready to throw the gun when he fired and dust flew up from my feet and nerves caused me to run. I was scared, I guess.

[fol. 235] Q. When you got out of the car, where do you mean you were standing?

A. I got out of the car on the right hand side of the car.

Q. The car between you and the officer?

A. No, he was at the right hand rear of my car so my object in getting out there was to throw the gun away from

the car so it wouldn't be found. I didn't have it for no reason and I knew it would be taken for another reason that I had it for.

Q. Where did you take that gun from?

A. Lester's trailer.

Q. Where was the second gun taken from?

A. The other gun came from the blue Ford or some other automobile.

Q. Had you prowled other cars?

A. They were looked at, yes, and a few articles taken.

Q. Where was this gun taken at?

A. A town or two before the town where the blue Ford was taken.

Q. When you located this 52 or 53 blue Ford, were the keys in the car? A. No.

Q. Will you please tell me how you caused the car to be operated?

A. Direct wire runs from the battery to the coil.

Q. Now, did you wire the car?

A. Well, I helped, yes.

Q. What happened then after you got the blue Ford?

A. My auto wasn't running so we towed it and I was going to have it fixed. Something happened and we kept on towing it.

Q. Where did you enter Nebraska at? Through Scottsbluff or Kimball? A. No.

Q. Harrison, Crawford and Chadron? A. Yes.

[fol. 236] Q. Did you stop overnight anywhere after you had taken this 53 blue Ford or did you drive directly to Valentine?

A. We pulled off and did some work on my car a couple of times.

Q. Other than that, you drove directly through the same day or the same night? A. Yes.

Q. Where did you go after you got to Valentine?

A. Well, we stopped off at Valentine and then went on to Springview and then I worked on my car some more. Leon helped me and we pulled it out in the country and tore it down there and tried to reassemble it some.

Q. Where did you do this?

A. South and east of Springview. There was a hay lot that was level.

Q. On whose place? A. I don't know.

Q. What day did you arrive in this area where Fredericksons live?

A. We went over there Wednesday night.

Q. After you arrived there on Wernesday night, tell us what your activities were Wednesday night.

A. We stopped and saw one of the Frederickson boys who lives at Norden, talked with him a while and then went to Francis Frederickson's and they have a younger brother, Freddie, who just came back from California a few days before. We stayed there and talked quite a while. We drove away from there and went to sleep.

Q. What else did you do that night?

A. As I remember, we drove back down to my car. It was quite late so we fought with it for a lit ie bit and then we went back in the car.

Q. Where did you go? To Wewela?

A. No, not that night. We went to another fellow's place, Brandenburgs I think it is. He is a bachelor. I worked for him three years ago. We stopped to see him.

[fol. 237] Q. Did you do any drinking there?

A. No, we had one drink but no drinking. We sat around and visited till about noon. I slept on the davenport for a couple of hours and then we got up and left.

Q. When did you go to Wewela?

A. It must have been Tuesday night.

Q. You didn't get there until Wednesday.

A. Then it must have been Wednesday night. It doesn't seem like it.

Q. What did you do at Wewela?

A. We took a few articles from the store.

Q. Who do you mean by "we", was your brother with you?

A. He was along, yes.

Q. Who else was there? A. Nobody, I guess.

Q. Just tell us about this deal at Wewela, how did you get in, what did you take and where did you go with it?

A. I don't exactly know where we went with it. I was asleep at the time.

Q. How did you get into the store?

A. The window was cracked open, just reached a hand through the door and opened it.

Q. Who cracked the window? A. I guess I did.
Q. Did you or didn't you? A. Yes.
Q. Did you go in by yourself or with your brother?
A. We were both in.
Q. Where was your car parked at this time?
[fol. 238] A. Down the street.
Q. What happened in the store?
A. Well, we grabbed up a few articles that we wanted and took off.
Q. What kind of articles?
A. Some food supplies, there was a box of pennies.
Q. Was there any clothing taken?
A. Yes, there was a little clothing taken.
Q. Were there any shells taken?
A. I believe there was some shells taken.
Q. Can you think of anything else that was taken?
A. Canned goods, meats, etc. Then we took off. We had several boxes, coffee, canned goods, meat and a couple of pots and pans.
Q. What else is in connection with this store?
A. It is kind of a hardware, just a little country store, everything involved that all country stores have, shovels, picks, hammers, nails, wrenches and what have you and then food.
Q. Were there any wrenches taken?
A. Yes, a few.
Q. Then you went and got the car and brought it up to the store and loaded this merchandise in? Who got the car?
A. No one. The stuff was taken out with us and put in the car.
Q. Then the car was right outside?
A. No, it was down the street. It wasn't an enormous amount of stuff.
Q. What time of night was it?
A. I don't have any idea, about 3 or 4 o'clock in the morning.
Q. What morning?
A. Must be Thursday morning.
[fol. 239] Q. What did you do then after you got the merchandise in the car?

A. My brother was driving, I was tired and I had been sick previously so I went to asleep and he went and took the stuff someplace and left it.

Q. Where did you go before you took it someplace and left it? A. We didn't go back to my car.

Q. Where did you go?

A. He was driving and I was asleep. I did wake up when the stuff was taken out of the car, where the location is I couldn't tell you.

Q. Did you help unload it? A. Yes, a few cases.

Q. Will you tell us of your activities on Thusday during the day and on up into the evening? What did you do all day?

A. We were at Brandenburg's place. We visited with him until about noon. We went to sleep for a couple of hours or so. We left and decided to get my car and bring it to Valentine to get it worked on so I would have my car.

Q. Back to the guns, were the guns loaded?

A. Yes, the one I had was loaded.

Q. Was the one your brother had loaded?

A. I couldn't say, I don't know whether it was loaded or not.

Q. Had you loaded your gun?

A. No, it was already loaded before I took it.

Q. About how many times have you fired that gun?

A. I did target practice with it that night. I shot 3 or 4 shots with it where my car is in the hay yard.

Q. Was it a pretty good gun? A. Yes.

Q. Worked all right?

[fol. 240] A. Seemed to.

Q. Could you hit what you were shooting at with it?

A. No.

Q. But it went off all the time?

A. Yes, it went off all the time.

Q. Did your brother fire his gun at that time too?

A. Yes.

Q. When you fellows started in to bring your car into town, where did you intend to go?

A. I don't know just exactly so I could get it fixed. Probably the cheapest place I could find.

Q. Eventually did you intend to go to Omaha?

A. Yes.

Q. Now what conversations did you and your brother have at the time you left there to bring the car into town as to what your intentions were in case you were stopped by the police?

A. Well, it wasn't spoke of. I guess it wasn't mentioned, neither of us had said anything about it.

Q. You had no plans in case you were stopped?

A. No.

Q. How come the guns were in different cars?

A. I guess because we had them down there the night before doing target practice so we each had a gun. My intentions were to get rid of mine when I got out of the car.

Q. How many shots did you fire at the patrolman?

A. I don't know.

Q. Did you fire more than once?

A. I don't know. When I fell over the bank I heard shots, I don't know.

[fol. 241] Q. You shot your gun there, didn't you?

A. I guess I must have.

Q. Tell the truth.

A. I guess so. I was stunned from falling over the bank. I wanted to throw the gun. He was shooting at me.

Q. Did you see the patrolman go down? A. No.

Q. Did you holler anything at him or did he holler anything to you? A. Not that I recall.

Q. How close was he to you?

A. I don't even know that, I just recall that I fell over the bank. He was quite a ways down to my right side. He had fired several times, I turned and that is when I went over the bank. I was running as hard as I could.

Q. After you fell into this ditch, did you get to your feet and run any more?

A. When I finally came to my senses I was running.

Q. After you fell in the ditch, what did you do?

A. I don't rightfully know.

Q. Did you crawl along on the ground?

A. I don't know, like I said I was running the next thing I knew, I was scared and I just kept running.

Q. When did you first find out you had shot the officer?

A. Not until they caught me.

Q. What was all the running for?

A. When people are looking for you with guns, that is what all the running was for.

Q. Did you see all the police today?

[fol. 242] A. No.

Q. Did you see some airplanes? A. Yes.

Q. Where were you in the canyons?

A. Yes, and along the river.

Q. Did you see a lot of cars along the river?

A. Some but not a large amount.

Q. Did you know they were after you? A. Yes.

Q. Were you under the bridge when they got you?

A. No, I was near the river and then I saw a lot of guys with rifles and I jumped off into the river.

Q. Where did you stay most of the time in the same canyon?

A. Yes, I had followed the river clear down, I guess.

Q. Did you sleep last night?

A. I don't know whether I did or not.

Q. Did you stop and lay down?

A. I don't know. I was half on my knees and my arms but I don't know whether I had been asleep or not or whether I just fell. I know I was dazed. I didn't hardly realize what had happened or what I was doing. I was just running.

Q. When the officer first approached you at the car, you jumped out of that car and ran, didn't you?

A. No, I walked around back of the car and was going to throw the gun. He fired a shot into the ground at my feet and that is when I turned and ran.

Q. Did he holler for you to halt?

A. I don't know. I fell and he hollered at me to get up. I did and ran and then he fired several times. I was too scared to know what I was really doing.

Q. Are you sorry you killed this officer.

A. I certainly am. I never did have the thought in my [fol. 243] mind to do that to anyone.

Q. Did you know this officer?

A. No.

Q. Had he ever stopped you? A. No.

Q. Had you heard of him?

A. No, I know rightfully if I hadn't fell, I wouldn't have shot, I would have got far enough away so I could throw the gun so it couldn't be found. When I fell over the bank, everything went black and I don't remember hardly anything until early this morning.

Q. If you had it to do over again, would you shoot that officer?

A. No, I certainly would not. I am very sorry.

Q. What did you finally do with the gun?

A. I don't rightly know.

Q. Do you remember having the gun after it went off?

A. No. I don't know whether it fell or whether I lost it or whether I had it in my pocket or how far I carried it.

Q. Did you have the gun when you woke up at daylight?

A. No, that is when I actually realized that this morning was remembering what happened, putting two and two together, knowing they were after me and I didn't know what had taken place.

Q. Had you been drinking last night? A. No.

Q. Did you take any medicine?

A. I had taken a couple of tablets that a doctor had given me a while back. They were old tablets and I don't think they had any effects.

Q. What were they for?

A. Streptomycin tablets. I have a lot of bronchial trouble. I contacted mine T.B. I had to get out of the mines. That is when I want back out to California.

[fol. 244] Q. Do you remember what doctor prescribed those for you? A. Dr. Eastman.

Q. Where is he located? A. Lead, South Dakota.

Q. When did he prescribe them?

A. He prescribed them for me quite sometime ago. About in December sometime.

Q. You took two of them? A. Yes.

Q. What drugstore did you have it filled at?

A. Different times at different stores.

Q. Where is the last place you had it filled?

A. In Deadwood but I don't remember where.

Q. How long since you have been in Deadwood?

A. Since New Years.

Q. How many did you get at a time?

A. Usually about what I could afford. Not too many.

Q. Approximately how many?

A. I would guess at 10, 12 or 15. I don't think that I have ever gotten more than 15.

Q. How frequently are you supposed to take them?

A. One every three hours, I believe, that is about what I had taken last night. Yesterday afternoon I took one and later in the evening another one at intervals of about three hours apart.

• • • • • • •

[fol. 247] Grandsinger: I am very sorry. I want to be cooperative. I have never done anything like this before in my life. As a matter of fact, I have never even had the thoughts.

I have read the above statement which consists of 16½ pages and I am initialing the errors and in addition am signing my name showing it is true and correct. I have not been abused or promised anything to make this statement.

LOYD C. GRANDSINGER.

Witnesses:

Robert E. Hamilton,
R. L. Davenport,
Ben F. Wilkinson,
Clerk Dist. Court.

[fol. 248] (Memorandum: The "X" on map just below "13" on top margin is location of Fritz Brandenburg's home. The "Y" is where Mr. Grandsinger states his brother and he were stopped.)

[fol. 249] Exhibit 9.

Lowell D. Widler Official Court Reporter Sixteenth Judicial District in and for Cherry County, Nebraska.

Case No..... Docket..... Page

Date..... Witness.....

Title of Case.....

.....Plaintiff

.....Defendant

Court of Cherry,
State of South Dakota—ss.:

I, Loyd C. Grandsinger, being first duly sworn, depose and say: I am 21 years of age. My birthday is August 28, 1932. Recently I have been living at 8422 Garfield Ave., Bell Gardens, California. Previously I have made a statement to officers concerning my shooting of officer Marvin Hansen. I have been asked to make a statement concerning the burglary of the store and post office operated at Wewela, S. Dak. by Frank Cole. My brother Leon Grandsinger and I came to South Dakota from California and arrived in my 1941 Ford car in the vicinity of Wewela, S. Dak. Wednesday April 7 about 4:00 or 5:00 p.m. We were driving a 1952 or 1953 Ford car blue gray color which Leon stole and drove off someplace in Wyoming. We towed my own car from that place to Wewela. We drove through Wewela the afternoon of April 7, coming in from the west. We came in through Hot Springs and Mission, S. Dak. then south from Mission and turned off east through country roads through Keyapaha past Milboro to Wewela. We drove to a spot along a creek southeast of Wewela and worked on my old Ford car awhile and then left it and drove the 1952 or 1953 Ford back west of Wewela and stopped at a farm owned by one of the Wiley boys and stole 20 or 25 gallons of gasoline from a pump in his yard. We filled the car and filled up a couple of cans, one of which I had and one I found there at Wiley's place. Leon picked up a tire and some tools while we were there and took them with us. We didn't see anyone around the place. We left before dark and went back down to where we left my car awhile and then Leon decided he

wanted to go to Jim Frederickson's place in Norden, Nebraska. We stayed there about 45 minutes and then went to Bud Frederickson's who lives about 5 miles from Norden about straight west. We got there about 8:00 p.m. This was on Wednesday, April 7. We stayed there all evening and left somewhere around midnight and then drove straight to Wewela, S. Dak. I did not have a watch, but I think we must have arrived there about 1:00 a.m. Leon was driving and we went to the back of the store and post office and parked. We stayed in the car quite some time and then went to the front door of the store and I broke out a window beside the front door, using a piece of 2 x 4 which I found out back of the store. I then reached around through the hole in the glass and opened the lock from the inside and we both went in together. We had a flashlight which Leon was carrying when we went into the store. At intervals I also had the light. We didn't use any of the flashlights we found and took from the store. During the time we were in the store and post office I was near the front door and Leon was back in the post office inclosure and I went back around a counter to see what he was doing and he came out carrying a cigar box and he opened it and shined the light on it to show me that it contained money. I have just now examined the same cigar box in the court house at Valentine, Nebraska, and I have initialed and dated the top cover of the box to identify it. [fol. 250] There was another cigar box on a window sill just back of the cash register and Leon brought the cigar box of money from the post office and placed it on top of the box of pennies. I have just now examined the cigar box of pennies in the court house at valentine, Nebraska. It is about ⅓ full of pennies and I have signed my name and the date on the cover of the box for identification. It is the same box we took from the store. We both made several trips from the store and post office to the car which was parked back of the building, carrying out the merchandise we took from the store. We carried it all out the front door and around the north side of the building to the car. When we got all the stuff into the car, in the back seat, it was full up about even with the tops of the seats. I do not remember all that we got, but I do remember the following: 4 cases of coffee, either Butternut or Folgers, 10 or 12 crescent wrenches, several vise grip pliers, 2 cases of eggs, one full and the other partly full, a box containing

clothing consisting of several pairs of overalls, some "T" shirts and sox, a couple of sweaters. We also a number of cans of miscellaneous canned goods, some meat including lunch meat, bologna, bacon and a variety of meats. We got a rope wire stretcher and I saw Leon take what I thought was an electric motor. On the last trip he carried a box or something and was a little ahead of me and I carried out the two cigar boxes containing money. He went back for a little, I believe to close the door. I put the two cigar boxes of money on the floor of the front seat. Leon drove, and I sat on the right side of the front seat. We were parked headed south back of the store and post office and when we left Leon backed up and headed out to the east to the highway. We started south and I dozed off to sleep while Leon drove. We went to Bud Frederickson's place near Norden, Nebraska, and got there as it was starting to break day. I stayed in the car and Leon talked to Bud. I think they stood by the door to talk. I was 30 or 40 feet away in the car and could not hear what they said. We were there perhaps 30 minutes. He came back to the car and he said we were going down around the river. I don't know just how far we went, but not too far. We turned off by a school house south and west of Bud Frederickson's place. We drove possibly half a mile and hid the merchandise in the canyon. We left all the mercandise there but kept the two cigar boxes in the car on the floor of the front seat. We went to the west and I knew we were in the vicinity of the home of Fritz Brandenburg for whom I had worked in about 1951. We stopped in to see him. We got there after daylight, but I do not remember seeing the sun, but it may have been cloudy. He gave us breakfast. We stayed around there talking until after dinner, and I went to sleep on the davenport. We left around 3:00 or 4:00 p.m. This was on Thursday, April 8. While we were in talking to Brandenburg, we left the two cigar boxes of money in the same place on the floor of the front seat of the 1952 or 1953 car we had. We didn't tell Brandenburg that we had been into the store and post office at Wewela. When we left around 3:00 or 4:00 p.m. we drove back down to where my old Ford car was. We got down to my old car [fol. 251] by a round about way around dark. We were there awhile to straighten out some of the stuff that was in

my car and then Leon tied the two of them together and we towed my old car back down to Bud Frederickson's. We unhitched the old car on top of the hill at Frederickson's and went in to see him. We talked to him and his brother Freddie. We then went back up and hooked onto my old car again and proceeded toward Valentine. We were stopped on the road east of Valentine about 20 miles and we were stopped by sheriff Bill Freeman and Highway Patrolman Marvin Hanson. I previously have made a statement to officers concerning my shooting and killing Patrolman Marvin Hanson. We had not spent any of the money we got out of the store and post office and it was still in the 1952 or 1953 Ford with which we were towing my old Ford. It still was on the floor of the front seat of that car where I had first put it when we took it out of the building at Wewela, S. Dak. the night before. The shooting took place late that night and I do not know what time it was. I escaped and hid along the river where I was arrested in the afternoon of the following day, which was Friday, April 9.

I have read the foregoing statement consisting of 3 pages and it is true and correct to best of my knowledge. I have been informed that I do not have to make a statement and that if I do make a statement it may be used in a criminal prosecution against me. However, I am making this statement of my own free will in order that the full truth may be known.

LOYD C. GRANDSINGER

Subscribed and sworn to before me at Valentine, Nebraska, April 11, 1954.

G. H. REIS
Post Office Inspector.

JAMES F. SHOEMAKER
Witness.

FRANK B. COLE
Witness.

[fol. 252] Counsel for respondent introduced in evidence Exhibit No. 12, a photostatic copy of requests for instructions filed with the District Court of Cherry County, Nebraska, by W. C. Heelan and Charles A. Fisher, as attorneys for Loyd Grandsinger, which requests are included in the permanent record of the Nebraska Supreme Court in the transcript.

[fol. 253] Exhibit No. 12.

Defendant's Request for Instruction No. 1

If the jury believe beyond a reasonable doubt that defendant is guilty but have a reasonable doubt as to the degree of his offense they should give him the benefit of that doubt and convict him of the lower degree.

Refused
E. L. MEYER,
Judge.

[fol. 254] Defendant's Request for Instruction No. 2

If the jury believe beyond a reasonable doubt that the defendant is guilty of first degree murder but have a reasonable doubt as to the punishment, they should give him the defendant the benefit of that doubt and fix the lessor punishment of life imprisonment.

Refused

E. L. MEYER.
Judge.

[fol. 255 Defendant's Request for Instruction No. 3

The jury are instructed that in weighing the testimony greater care should be exercised in relation to the testimony of police officers, detectives, criminal investigators, and safety patrolmen than in other cases because of the natural and unavoidable tendency and bias of mind of such persons to construe everything as evidence against the accused and

to disregard everything which does not tend to support their preconceived opinion of the guilt of the accused.

Refused

E. L. MEYER,
Judge.

[fol. 256] Defendant's Request for Instruction No. 4

You are instructed that in weighing the testimony, greater care should be exercised in relation to the testimony of law enforcement officers than in other cases, because of the natural and unavoidable tendency and bias of mind of such persons to construe everything as evidence against the accused, and to disregard everything which does not tend to support their preconceived opinion of the guilt of the accused.

Refused

E. L. MEYER,
Judge.

[fol. 257] Defendant's Request for Instruction No. 5

Loyd Carroll Grandsinger, the man on trial in this case, has taken the witness stand and given testimony in his own behalf and in this connection you are instructed that the law of this State is that a person charged with a criminal offence has a right to testify in his own behalf and the jury have no right to disregard such testimony simply on the ground that he is the defendant and stands charged with the commission of a crime and the jury should consider the evidence given by Loyd Carroll Grandsinger, together with all the evidence in this case in determining whether or not he is guilty or innocent of the crime charged.

Refused

E. L. MEYER,
Judge.

[fol. 258] Defendant's Request for Instruction No. 6

You are instructed that a verdict is the expression of concurrence of individual judgment. The proper functioning

of a jury is to be determined wholly by the proper functioning of each individual juror. It involves that from the evidence each individual juror should be led independently and conscientiously to the same conclusion. This unanimous conclusion of twelve different minds is the "certainty of fact sought in the law." If this required "certainty of fact" does not exist in such degree that twelve reasonable minds, independently and conscientiously upon due consideration, arrive at the same conclusion, a disagreement is not only a full performance of a juror's proper function, but it is imperative, if the fundamental basis of trial by jury is to be preserved.

So, too, no juror should be influenced to a verdict by fear of personal criticism, possible disgrace, or pecuniary injury. No juror should be induced to assent to a verdict by a fear that a failure to agree would be regarded by the public as reflecting upon his intelligence or integrity, or as a failure to promptly perform a public duty. Personal consideration should never be permitted to influence a juror's conclusion.

It may also be said that the determination in every jury trial whether the required certainty of fact exists in the necessary degree to justify an agreement is exclusively a question of fact which is for the sole determination of the jury.

Refused

E. L. MEYER,
Judge.

[fol. 259] Defendant's Request for Instruction No. 7.

The jury are instructed that evidence has been introduced tending to show that the defendant made certain admissions of statements appearing in evidence. Verbal statements or admissions should be received by you with great caution, as they are subject to much imperfection and mistake, owing to the person speaking not having clearly expressed his own meaning, or the person spoken to not having clearly understood the speaker. It frequently happens,

also, that the witness, by unintentionally altering a few words or expressions really used, gives an effect to the statement entirely at variance with what the speaker did say. In this connection the jury should bear in mind the infirmity of memory and that the mind of the prisoner himself is often oppressed by the calamity of the situation, and that he is sometimes influenced by motive of hope or fear to make statements.

Refused

E. L. MEYER,
Judge.

[fol. 260] Defendant's Request for Instruction No. 8.

You are instructed that if after consideration of the whole evidence in the case, any juror entertains a reason-doubt of the defendant's guilt, it is the duty of such juror so entertaining such doubt, not to vote for a verdict of "guilty" or be influenced if so voting for the single reason that a majority of jurors should be in favor of a verdict of guilty.

Refused

E. L. MEYER,
Judge.

[fol. 261] Defendant's Request for Instruction No. 9.

The law requires before you can find the defendant guilty the evidence must have established his guilt beyond a reasonable doubt. Suspicious circumstances, probabilities, or possibilities, no matter how grave or strong are not sufficient.

Refused

E. L. MEYER,
Judge.

[fol. 262] Defendant's Request for Instruction No. 10.

You are instructed the defendant is clothed with the presumption of innocence which stands as evidence in his

favor and this presumption remains until the state by its proof shows him to be guilty beyond a reasonable doubt. The burden of furnishing such proof is with the prosecution throughout the trial, and never shifts. If the evidence or any material part thereof is susceptible of two constructions, one in favor of the state and the other in favor of the defendant, the doubt must be resolved in behalf of the innocence of the accused and every intendment or inference under the evidence, considered in its entirety, must be construed in defendant's favor.

Refused

E. L. MEYER,
Judge.

[fol. 263] Defendant's Request for Instruction No. 11.

You are instructed that in order to warrant a conviction on circumstantial evidence, the circumstances, taken together, must be of such conclusive nature and tendency, as to produce a reasonable and moral certainty that the accused, and no one else, committed the offense charged. It is an invariable rule of law that, to warrant a conviction upon circumstacial evidence alone, such facts and circumstances must be shown as are consistent with the guilt of the party charged, and inconsistent with his innocence; and in this case, if all of the facts and circumstances relied upon by the State to secure a conviction can reasonably be accounted for upon any theory consistent with the innocence of the defendant, then the jury should acquit.

Refused

E. L. MEYER,
Judge.

[fol. 264] Defendant's Request for Instruction No. 12.

You are instructed that if you believe from the evidence that the deceased and the defendant were engaged in a

scuffle and while so engated the deceased accidentally met his death then you should find the defendant not guilty.

Refused

E. L. MEYER,
Judge.

[fol. 265] Defendant's Request for Instruction No. 13.

You are instructed that if the death of Marvin Hansen was not intentional and was accidental, that this is known in law as excusable homicide and if you so find your verdict should be not guilty. Or if there is a reasonable doubt as to whether the death was accidental you should give the benefit of the doubt to the defendant and acquit him.

Refused

E. L. MEYER,
Judge.

[fol. 266] Defendant's Request for Instruction No. 14.

You are instructed that in order to warrant a conviction on circumstantial evidence, the circumstances, taken together, must be of such conclusive nature and tendency, as to produce a reasonable and moral certainty that the accused, and no one else, committed the offense charged. It is an invariable rule of law that, to warrant a conviction upon circumstantial evidence alone, such facts and circumstances must be shown as are consistent with the guilt of the party charged, and inconsistent with his innocence; and in this case, if all the facts and circumstances relied upon by the State to secure a conviction can reasonably be accounted for upon any theory consistent with the innocence of the defendant, then the jury should acquit.

Refused
Same
as 11

E. L. MEYER,
Judge.

[fol. 267] Defendant's Request for Instruction No. 15.

The jury are instructed that Exhibit "25" has been received and read in evidence, but that the defendant's contention is that this statement was not voluntarily made, but was involuntary due to the manner in which defendant was held in confinement, and the treatment while so held, and that the Inspector Reis did not correctly interpret what the defendant said so it was understood by the defendant. The question as to whether Exhibit "25" was voluntary and whether the inspector correctly stated the contents thereof to the defendant, and whether the defendant understood it is a question of fact to be determined by the jury. If the jury finds said Exhibit "25" was not voluntarily made, or that the same was not correctly interpreted to the defendant, or that he did not understand it, then the jury should entirely exclude if from their consideration.

Refused

E. L. MEYER,
Judge.

[fol. 268] Defendant's Request for Instruction No. 16.

You are instructed that the information filed against the defendant herein is also an information covering those offenses which are known in law as included offenses, including therein the offense of murder in the second degree, manslaughter, and assault and battery, and assault. That manslaughter is defined by the statutes of Nebraska, as follows: "Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter. That assault and battery is defined by the statutes of Nebraska as follows: "Whoever unlawfully assaults, or threatens another in a menacing manner, or unlawfully strikes or wounds another, shall upon conviction be" followed by the penalty. Battery is also defined as the carrying out of an assault. Assault

does not necessarily include a battery, but is an offer to do a battery.

Refused

E. L. MEYER,
Judge.

[fol. 269] Defendant's Request for Instruction No. 17.

The jury are instructed that in weighing the testimony of a witness employed by the State that it should exercise greater care and subject his testimony to closer scrutiny than in case of a witness who is wholly disinterested.

Refused

E. L. MEYER,
Judge.

[fol. 270] Defendant's Request for Instruction No. 18.

You are instructed that a person may resist an unlawful attempt at arrest; and, if necessary, rather than submit to the same, that is an unlawful arrest, he may lawfully kill the person making it. That in the present case the defendant was violating no laws of Nebraska, and the Patrolman Marvin Hansen, had no right to arrest him without a warrant, and the attempted arrest by Hansen was unlawful.

Refused

E. L. MEYER,
Judge.

[fol. 271] Defendant's Request for Instruction No. 19.

A crime may be proved either by direct or circumstantial evidence. Direct evidence is when a person testifies from his own knowledge as to a main fact in issue, or as to the point to be proved. Circumstantial evidence is proof of certain facts or circumstances in a cause, or case, from

which you may infer such other connected facts as usually and reasonably flow therefrom, according to the common experience of mankind. You are instructed that the rule governing the weight to be given circumstantial evidence which applies and should be followed in your deliberations in this case is, that where circumstances are relied upon, in whole or in part, to establish the guilt of the accused, it is not sufficient that the facts and circumstances may create a probability, though a strong one; but, it is necessary that the circumstances essential to the conclusion sought, be established by the evidence, beyond a reasonable doubt, and when taken together as a whole and given their reasonable and just weight, and no more, and considered with all the other evidence in the case, must be of such a character as to be consistent with each other, and with the hypothesis sought to be established thereby, and such as, to a moral certainty, exclud every other reasonable hypothesis, and such as cannot, or any reasonable theory or hyhothesis be true and the defendant innocent.

If such circumstances, together with the direct evidence offered in this case, do not satisfy the minds of the jury, beond a reasonable doubt, of the guilt of the defendant, then you should, by your verdict acquit the defendant.

Refused

E. I. MEYER,

Judge.

[fol. 272] Defendant's Request for Instruction No. 20.

Deliberation means the act of deliberating or weighing and considering the reasons for and against a choice or measure. In the sense which the word is here used, an act is done deliberately, or with deliberation, when it is done in cool blood and not under the influence of violent passion, suddenly aroused by some real or supposed grievance. A person who does an act, not in the heat of sudden passion,

but after having cooly weighed or considered the mode and means of its accomplishment, does it deliberately.

Refused

E. L. MEYER,
Judge.

[fol. 273] Defendant's Request for Instruction No. 21.

You are instructed that The Nebraska Safety Patrol, and its subordinate officers such as captains, lientenants, sergeants, corporals, patrolmen , and other employees shall be used primarily for the enforcement of the traffic and motor vehicle laws of the State of Nebraska and the nadling of traffic within the state; provided however the superintendent , with the approval of the Governor, may designate such personnel of Patrol to qualify and act as his deputites or investigators to assist him in the enforcement of the laws of the state relating to felonies. That Marvin Hansen, the patrolmen who was killed and whose death is cause of charge against the defendant was not at the time of hie death acting under any special designation and was not acting as a depty or and an investigator in the enforcement of the laws of the state relating to felonies.

Refused

E. L. MEYER,
Judge.

[fol. 274] Defendant's Request for Instruction No. 22.

The jury are instructed that in this case the defendants set up the plea of self-defense. The rule of law on this subject of self-defense is this: Where a man is attacked, and where from the nature of the attack there is reasonable ground to believe that there is a design to take his life or to do him great bodily harm, and the party attacked does so believe, then the killing of the assailant under such circumstances will be excusable or justifiable, although it should afterwards appear that no injury was intended and no real danger existed.

The jury are instructed that if they from the evidence believe that at the time the defendant, Loyd Carroll Grandsinger is alleged to have shot Marvin Hansen, the circumstances surrounding the defendant were such as in sound reason would justify or induce in his mind an honest belief that he was in danger of receiving from the said Marvin Hansen great bodily harm, and that the defendant Loyd Carrol Grandsinger in doing what he they did was acting from instinct of self-preservation, then he is not guilty although there may in fact have been no real or actual danger.

Refused

E. L. MEYER,
Judge.

[fol. 275] Defendant's Request for Instruction No. 24.

You are instructed that evidnce has been introduced to show that at the time and place in question the revolver claimed to have caused the death of Hansen was accidently discharged. An accident is defined to be an event which happens not purposely or intentionally and happens without the concurrence of the will of the pe4son by whose agency it is or was causeed. The burden is not upon the defendant to prove that the shooting was an accident, but to warrant a verdict of guilty the state must satisfy you beyond a reasonable doabt that the revolver at the time of and in the place in question was not accidnetly discharged, or, if accidently discharged, that the defendant was then in the commission of an unawful act . In which event the defendant could at most be guilty of mansiaughter.

If the shot which cuase the death of Marvin Hansen, (and you must first find that a shot caused his death) was wholly accidently so far as the defendant was concenred, and without intention on his part to kill or injure , then your verdict should be not guilty.

Refused

E. L. MEYER,
Judge.

[fol. 276] Defendant's Request for Instruction No. 25.

THE State has offered in evidence alleged statements claimed to have been made by the defendant. Before you can consider any such alleged statements or admissions of the defendant you must be satisfied and believe from the evidence, that same were made freely and voluntarily, and not by reason of hope or fear on his part or by reason of any promises, threats, inducements, persuasion, coercion, or compulsion by anyone. In determining these questions you should consider all the evidence given in the trial of this case, examining and analyzing it carefully, taking into consideration the position of the defendant at the time such alleged statements are claimed to have been made by him, the circumstances and conditions surrounding him, the credibility of the witnesses detailing the circumstances, defendant's strength or weakness of mind and body, if same is shown by the evidence, the probability or improbability of the alleged statements, and whether the same, if made by the defendant, were made by reason of any hope or fear on his part or induced by any promises, threates, inducements, persuasions, coercion, or compulsion.

If you are saitsified by the evidence that any such statements or admissions were made by the defendant, and that same were freely and voluntarily made by him, and not induced by any promises, threats, inducements, coercion or cumpulsions on the part of any one, then you should consider any such statement or admission so made, and give the same such credence and weight as you deem it entitled to receive, and if the jury believes all or the whole of any statement or admission they should act upon the whole as true. But the jury may believe part of any such statement [fol. 277] or admission and reject the balance, if they see sufficient grounds in the evidence for so doing.

On the other hand, you should wholly disregard, and not consider any statement or admission offered in evidence in this case, if you are not satisfied from the evidence that it reflects what the defendant said or meant, and that same was made voluntarily and freely by the defendant, and not

induced by any hope or fear on his part or by any promises, threats, inducements, coercion or cumpulsion of anyone.

Refused

E. L. MEYER,
Judge.

[fol. 278] Defendant's Request for Instruction No. 26.

You are instructed that in weighing the testimony of Francis Frederickson, alias Bud Frederickson, greater care should be exercised in relation to his testimohy , because he is what is known as an informer, or undercover man, that such persons have a natural and unavoidable tendency and bias of mind to construe everything as evidence against the defendant which does not tend to support their preconceived opinion of guilt of the accused.

Refused

E. L. MEYER,
Judge.

[fol. 279] Rush C. Clarke, on behalf of respondent, testified:

I live in North Platte, Nebraska, and have been a member of the Bar of the State of Nebraska since 1922. In the case of the State of Nebraska v. Loyd Carroll Grandsinger, in the District Court of Cherry County, Nebraska, in June, 1954, I was appointed by the District Court at the request of the County Attorney to assist in the prosecution, and did so, and I was present throughout the trial. The single-spaced portion of Exhibit No. 1 is a correct copy of the record with reference to the tenth day of that trial. I did not see Mr. Fisher push a dowel through an exhibit. I first learned of this very shortly after it purportedly happened. I was in the District Judge's chambers with Mr. Heelan and Judge Meyer, the presiding judge, discussing a matter with counsel and with the court when I learned of it. Mr. Quigley and Mr. Fisher came into the judge's chambers, Mr. Quigley made a report to the judge, and there was a conference which lasted 40 minutes to an hour, and it was after this conference when the proceedings shown on the second and third pages of Exhibit No. 1 took place. I dictated this

into the record before the jury in the presence of the jury immediately after the jury was called into the court room. At that time I did not have any of the exhibits in my hand, except that toward the end of the portion which I dictated I picked up a dowel and handed it to the court reporter for identification. I did not wave any exhibit before the jury, either at that time or before or after that or during the argument, or have it in my hand.

[fol. 280] Mrs. Frances Bloom, on behalf of respondent, testified:

My name was formerly Frances Wells, and I live in Valentine, Nebraska. I am a member of the Bar of the State of Nebraska and a legal secretary, with experience as a court reporter. I saw the petitioner, Loyd Grandsinger, on April 9, 1954, in the District Judge's chambers in the court house in Valentine, Nebraska, where he was questioned by Leo Knudtson of the Nebraska Safety Patrol and by Jack Knudtson. Exhibit No. 8 is a photostatic copy of the statement of the petitioner which I took and transcribed that day, which statement was Exhibit No. 19 in the trial in the District Court of Cherry County, Nebraska. I took everything down that was asked and answered except the opening statements which the petitioner asked not to be taken down, and this exhibit is accurate so far I know.

[fol. 281] George H. Reis, on behalf of respondent, testified:

I live at Pierre, South Dakota, and have been a postal inspector since 1941. I saw the petitioner in Valentine, Nebraska, on Sunday, April 11, 1954, in the clerk of the court's office. I was there with Mr. James Shoemaker, the sheriff from Winner, South Dakota, and with Mr. Frank Cole, the postmaster from Wewela, South Dakota. I took a written statement from the petitioner at that time. Exhibit No. 9 is a photostatic copy of that statement and this statement was Exhibit No. 25 in the District Court of Cherry County, Nebraska, in the case of the State versus Loyd Carroll Grandsinger. The actual wording is largely my own, but the wording was called to his attention and the petitioner was asked if it was correct. I asked Loyd Grand-

singer questions concerning the circumstances included in this affidavit and when we came to an agreement on a certain point I would type it in the affidavit. He read the statement when I had finished typing it, and he executed an oath before signing it. My purpose in questioning the petitioner was in connection with the post office burglary at Wewela, South Dakota, and I was not investigating specifically with reference to the shooting of Marvin Hansen. The County Attorney told me that he should like to determine whether the money from the post office had been continously in the possession of the petitioner and his brother up to the time they were stopped on the highway east of Valentine, and the questioning was along that line.

[fol. 282] The following testimony of WILLIAM C. FREEMAN given at the trial in the District Court of Cherry County, Nebraska, in the case of State versus Loyd Carroll Grandsinger, was read into the record on behalf of the respondent:

I live in Valentine, Nebraska, and am the sheriff of Cherry County, Nebraska. In my childhood and youth I became accustomed to the use of small arms. I first had experience with a .22 calibre firearm when I was about 16 or 17, and I think I owned a .22 rifle most of that time, and shot it quite a bit. My military service was with the Military Police in Washington, D. C. I went in in April, 1942, and was discharged in May, 1943. In my military service, I carried a .45 automatic or .45 revolver as a sidearm, and about every week, and at least once every other week, we had target practice when we used .22 pistols. I lived in Omaha for about a year after leaving the armed services, and then moved to Brown County and then to Cherry County, where I have lived ever since. About one year after I came to Valentine, I was made chief of police. After leaving the armed services until I became chief of police I had a .22 rifle that I would target-practice with. While I was chief of police in Valentine I carried firearms, worked with other officers who were armed, and particularly worked with Marvin Hansen. I knew Marvin Hansen during all of the time I was chief of police, and we went out target practicing quite often. I resigned as chief of police to work

on a ranch, and later came back to Valentine as chief of police where I continued in the use of firearms, and in my association with Marvin Hansen. In June, 1953, I was appointed county sheriff. After that Marvin Hansen and I practiced in the use of firearms, and this practice consisted of target practice and in the actual use of firearms on some occasions in the performance of joint duties. Our guns were identical except for serial numbers, and I used Marvin Hansen's gun pretty often, and he shot mine. On the evening of April 8, 1954, from 8 or 10 o'clock until the time of his death, I was with him constantly. He was in uniform [fol. 283] that night, and wore a Sam Browne belt to carry his holster on and a pouch for his handcuffs. Exhibit No. 12 is Marvin Hansen's gun, which is a Smith & Wesson .38 revolver. Marvin Hansen did not carry any other gun on April 8, 1954, and I did not ever know him to carry any other gun. When we pulled up and stopped, I opened the door on my side of my car, and jumped out, and Marvin Hansen opened the door on the right side and jumped out. We hollered for the fellows to come out the doors with their hands up. Leon Grandsinger opened his door and swung his feet out to put them on the ground or the running board, and he had the gun in his hand at his side and I told him to drop the gun and come out with hands up. While I was having Leon Grandsinger get out of the car and back up towards me, I heard a car door and quite a bit of noise at the rear car that was behind the car that Leon got out of. When I heard the fellow go out of the right-hand door, I heard somebody running, and I heard Marvin holler "Stop". Then there was a pause and he hollered "Stop" again. There was a pause and then he said "Get up," and there was a shot. The voices were quite close, I could tell that Marvin Hansen was just west of the rear car of the two cars which were tied together. From my experience with firearms, that shot was shot by .22. There was just a slight pause and then there other shots, which were .38's and .22's. A .22 is just a ping, and the sound of a .38 is a bang. The difference in the sound is distinguishable. Exhibit No. 11, a Sam Browne belt, was worn by Marvin that night. It was later when I observed a little hole in it, and this belt is now in the same condition as it was then when I examined it when I found it out there. The holes in the Sam Browne belt are now the same as when I first examined

it. (Exhibit No. 11, the Sam Browne belt, which was received in evidence in the trial in the District Court of Cherry County, Nebraska, in the case of State versus Loyd Carroll Grandsinger, was received in evidence in the hearing of this cause in the United States District Court as Exhibit No. 16).

[fol. 284] The following testimony of DR. JOHN E. FARNER given at the trial in the District Court of Cherry County, Nebraska, in the case of State versus Loyd Carroll Grandsinger, was read into the record on behalf of the respondent:

I live in Valentine, Nebraska, and have been admitted to practice as a doctor of medicine in Nebraska for about 14 years, and am engaged in the general practice of medicine and surgery. I have served some time in the armed forces, and had a reserve commission in the infantry for about five years. About midnight April 8, 1954, I saw the body of Marvin Hansen. I was called to the hospital, and when I got there the body was at the hospital, and he had just recently died. There were two wounds I observed that night. With reference to the marks on the left frontal part of the body, I have drawn a circle on a piece of paper in order to show the size of that hole, this paper being identified as Exhibit No. 47. (Exhibit No. 14 in the hearing of this cause in the United States District Court is a photostatic copy of Exhibit No. 47 in the case of the State versus Loyd Carroll Grandsinger.) The little circle I have drawn on Exhibit 47 represents the actual opening in the skin in the entering wound. I did what was necessary to make an internal examination of the body to see what the course was and whether the two wounds were connected and what the course of the wound was. I made an incision from the xiphoid process down to the symphysis disk and opened the abdominal cavity. When I opened the cavity there was better than a quart of blood in the peritoneal cavity. Just inside the abdominal cavity there was a penetrating wound through the peritoneum in line with the left external wound. There was another penetrating wound through the perito-

neum just to the left of the midline. From this point on the course of the wound remained posterior to the peritoneum. The peritoneum was opened and the retroperitoneal space explored. There was considerable more blood in this space. A penetrating wound was found through the aorta just above the bifurcation of the aorta, and then it proceeded [fol. 285] on and hit the lower pole of the kidney and then it hit the lower outer border of the twelfth rib, and then traveled subcutaneous in a downward direction to the point of exit. This point of exit, on the right, was where the other exterior wound was, and was slightly larger than the left side wound. I drew a substantially correct diagram of the interior of the vessel or an interior diagram of the location of these various places in the human body, which is Exhibit No. 48. Exhibit No. 15 in the hearing of this cause in United States Distric Court is a photostatic copy of Exhibit No. 48 in the case of State versus Loyd Carroll Grandsinger in the District Court of Cherry County, Nebraska.) Exhibit No. 48 shows the aorta, the bifurcation of the aorta, the course of the wound concerning which I have testified, and then the direction and the line. From my examination of the body, and the observations I made, it is my opinion that the wound was caused by a bullet. The death of Marvin Hansen was caused by a massive loss of blood from the aorta, which was directly due to the wound through the aorta. The immediate effect of such a wound would have been very slight, but then things begin to happen very fast. The blood gets into the peritoneal cavity and the person will bleed to death. I found a lot of blood in the peritoneal cavity, and practically all of it came from the aorta. It is my opinion that this wound was caused by a bullet, and I know of no other thing in an ordinary circumstance that would create such a wound. In my opinion, such a wound could have been caused by a .22 caliber bullet. My opinion is that it was a small caliber wound produced by a small caliber bullet. I couldn't say whether it was a .22 or a .25. I am pretty sure it couldn't be a .32 and I am awfully sure that it couldn't be a .38. It was a wound that could have been produced by a .22 caliber and could not have been caused by a .38 caliber bullet.

EXHIBIT 14.

(P. 243)
[p. 244 is Blank]

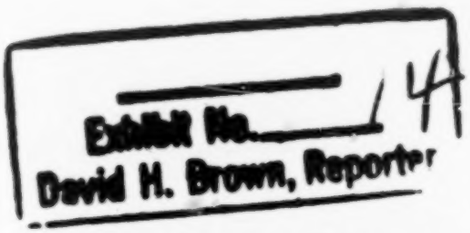


EXHIBIT NO. 47

Lowell D. Widler Official Court Reporter
Sixteenth Judicial District in and
for Cherry County, Nebraska

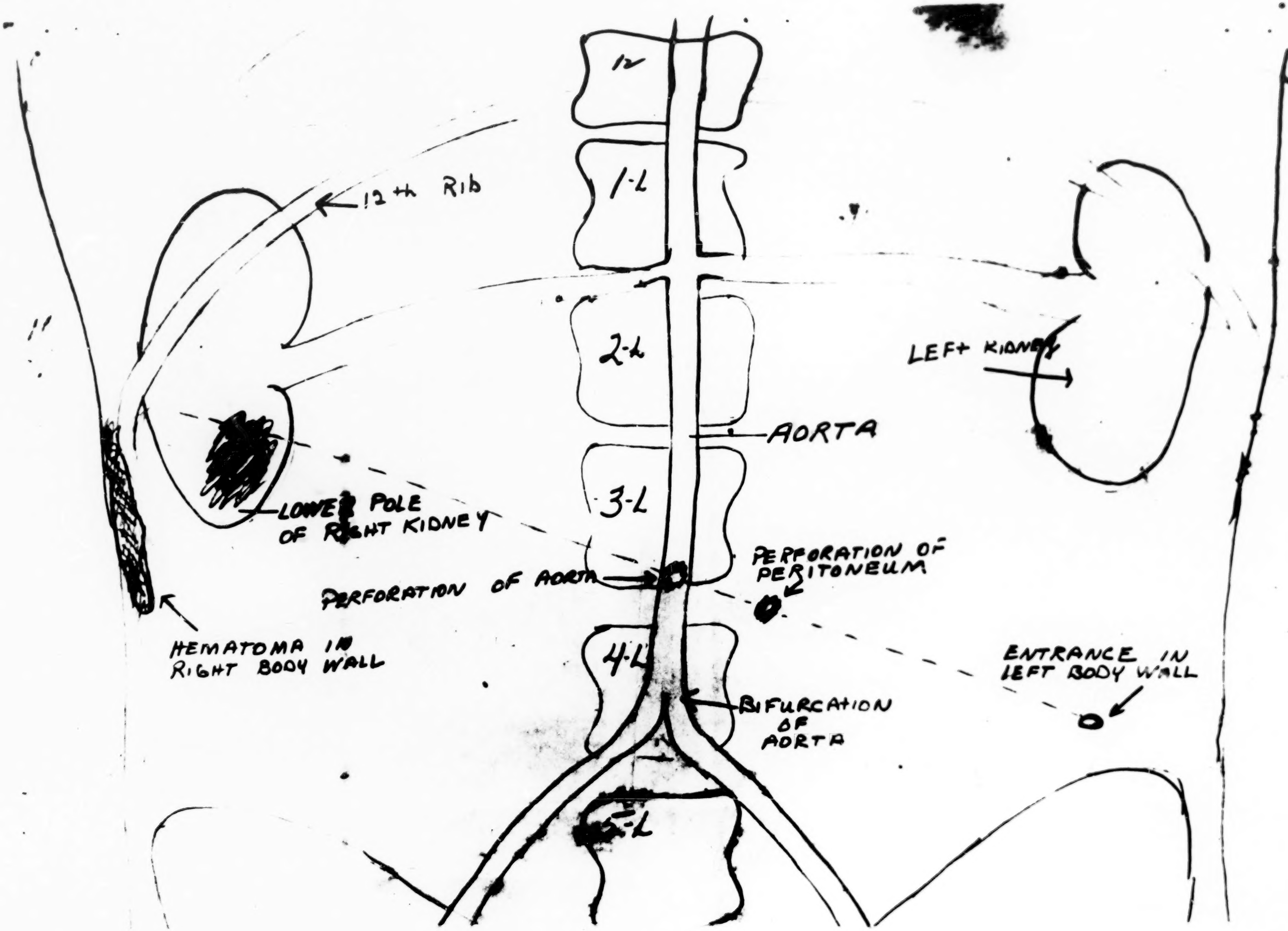
Case No. ..... Docket ..... Page

Date ..... Witness .....

Title of Case .....

..... Plaintiff

..... Defendant


12th Rib
12
1-L
2-L
3-L
4-L
5-L
AORTA
LEFT KIDNEY
LOWER POLE OF RIGHT KIDNEY
PERFORATION OF AORTA
PERFORATION OF PERITONEUM
HEMATOMA IN RIGHT BODY WALL
ENTRANCE IN LEFT BODY WALL
BIFURCATION OF AORTA

[fol. 288] The following testimony of WAYNE BYLER given at the trial is the District Court of Cherry County, Nebraska, in the case of State versus Loyd Carroll Grandsinger, was read into the record on behalf of the respondent:

I live in Lincoln, Nebraska, and I am a Lieutenant in the Nebraska Safety Patrol assigned to the criminal division, in charge of the firearms, identification laboratory. I have been in charge of that laboratory since April, 1952, and I have been with the Safety Patrol since 1940. I have had experience with firearms ever since I was a little boy. As soon as I was old enough I subscribed to the American Rifleman in order to further my knowledge. After I was employed by the Safety Patrol in 1940 I started conducting tests for accuracy and for effect of bullets. I have studied all of the available material put out by manufacturers of firearms and by the manufacturers of cartridges which are accepted as authoritative. I have made experiments for the purpose of determining the effects of bullets discharged from firearms upon hitting various objects and the size of the holes made by such bullets. This testing has been done mainly in the last five or six years. Generally I am able to form an opinion as to whether a given bullet hole could or could not have been made by a certain weapon. With reference to Exhibit No. 11, a Sam Browne belt (Exhibit No. 16 in the United States District Court hearing of this cause), the hole is in the outer flap of the leather and is approximately one-quarter inch back and up from the tip. It entered just inside the lip of the stitch and penetrated the outer belt and continued on through the second, the belt proper, at about two thirds of the way up from the lower part of the belt, penetrating it just to the left of the D-ring. It is my opinion that neither of the holes in Exhibit No. 11 could have been made by a .38 caliber bullet, and it is my opinion that they could have been made by a .22 caliber bullet. I have made special tests for the purpose of forming my opinion. A .44 is twice as big as a .22 and a .38 bullet is a little bigger than half again as large as a .22. For the [fol. 289] tests I used leather of the same type that is in Exhibit No. 11, and I made some tapered pins to further help me and to see how far these pins would penetrate the hole left in the leather. Among other tests, I shot a hole

in similar leather with a .38 special revolver, using a .38 special metal-penetrating bullet. Of the three types of the .38 bullets I used, the metal-penetrating bullet makes the smallest hole. By sight, I attempted to shoot in the test leather in the comparable place where the hole appears in Exhibit No. 11, and the hole in the test leather belt is about three-eighths of an inch up and to the left. (The record of the trial in the District Court of Cherry County, Nebraska, in the case of State versus Loyd Carroll Grandsinger shows that at the conclusion of the testimony of Lieutenant Byler at 3:00 o'clock on Thursday, June 10, 1954, the plaintiff rested).

[fol. 290] (Order of U. S. District Court granting Certificate of Probable Cause.)

(Filed in U. S. District Court Aug. 5, 1957)

In The United States District Court
For The District Of Nebraska.

Loyd Carroll Grandsinger, Petitioner,
No. 0265 vs. Civil
Joseph B. Bovey, Warden, Nebraska State Penitentiary, Respondent.

On this 5th day of August, 1957, this matter came on to be heard upon the application of the respondent for a certificate of probable cause for an appeal in this cause to the United States Court of Appeals for the Eighth Circuit, and it appearing to the Court that probable cause for an appeal exists in this cause in that it presents an important legal question that should be passed upon on appeal, and that appeal will be taken in good faith;

It Is Therefore Considered And Ordered:

1. That a certificate of probable cause for appeal in this cause be and it hereby is granted; that it be, and it hereby is certified, that probable cause exists for an appeal by the respondent to the United States Court of Appeals for the

Eighth Circuit from the Order and Judgment of this Court made and entered on July 29, 1957.

2. That, so far as may be required or proper, such appeal be allowed and the right thereto granted.

3. That the Clerk of this Court transmit copies of this order to the petitioner, to the respondent, to Eugene D. O'Sullivan, Sr., to Charles H. Flansburg, and to the Attorney General of the State of Nebraska.

Dated this 5th day of August, 1957.

By the Court:

JOHN W. DELEHANT,
United States District Judge

(Retired, Serving by Assignment)

[fol. 291] Notice of Appeal.

(Filed in U. S. District Court Aug. 27, 1957)

In The United States District Court
For The District Of Nebraska.

Loyd Carroll Grandsinger, Petitioner,
No. 0265 vs. Civil
Joseph B. Bovey, Warden Nebraska State Penitentiary, Respondent.

Notice is hereby given that Joseph B. Bovey, Warden, Nebraska State Penitentiary, the respondent above named, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the Order and Judgment entered in this action on July 29, 1957 discharging and releasing the petitioner from custody insofar as said custody is had in pursuance of the judgment and sentence of the District Court of Cherry County, Nebraska, of June 16, 1954, and insofar as said custody is in pursuance of the Death Warrant issued by the Supreme Court of the State of Nebraska

on October 29, 1956, ordering the execution of the aforesaid judgment and sentence of the District Court of Cherry County, Nebraska.

CLARENCE S. BECK,
Attorney General
of Nebraska.

RALPH D. NELSON,
Assistant Attorney General
of Nebraska.

Attorneys for Respondent-
Appellant.

2119 State House
Lincoln 9, Nebraska.

[fol. 292] Statement of Points on Appeal.

(Filed in U. S. District Court Sept. 5, 1957)

In The United States District Court
For The District Of Nebraska.

Loyd Carroll Grandsinger, Petitioner,
No. 0265 vs. Civil
Joseph B. Bovey, Warden, Nebraska State Penitentiary,
Respondent.

Respondent-appellant herewith presents the points upon which he claims the court erred:

1. In discharging and releasing the petitioner herein from custody insofar as said custody is had in pursuance of the judgment and sentence of the District Court of Cherry County, Nebraska, of June 16, 1954, and insofar as said custody is in pursuance of the Death Warrant issued by the Supreme Court of Nebraska on October 29, 1956, ordering the execution of the aforesaid judgment and sentence of the District Court of Cherry County, Nebraska.

2. In holding that the petitioner was denied due process of law at his trial and conviction in the District Court of Cherry County, Nebraska, in violation of his rights under the Constitution of the United States.

3. In holding that the petitioner had been denied his constitutional right to the effective assistance of counsel.

4. In that the ruling of the court is not sustained by the evidence and is contrary to the evidence.

5. In holding that the judgment and sentence of the District Court of Cherry County, Nebraska, entered on June 16, 1954, in the case entitled State of Nebraska v. Loyd Carroll Grandsinger, and that the Death Warrant issued by the Supreme Court of the State of Nebraska on October 29, 1956, commanding the respondent-appellant to [fol. 293] proceed to carry into execution the aforesaid sentence and judgment of the District Court of Cherry County, Nebraska, are unconstitutional, null and void and of no force and effect whatsoever.

CLARENCE S. BECK,
Attorney General
of Nebraska.

RALPH D. NELSON,
Assistant Attorney General
of Nebraska.

Attorneys for Respondent-
Appellant

2119 State House
Lincoln 9, Nebraska.

[fol. 294] Designation of Contents of Record on Appeal.

Filed in U. S. District Court, Sept. 5, 1957)

In The United States District Court
For The District Of Nebraska.

Loyd Carroll Grandsinger, Petitioner,
No. 0265 vs. Civil
Joseph B. Bovey, Warden, Nebraska State Penitentiary,
Respondent.

The respondent-appellant hereby designated for inclusion in the record on appeal the following portions of the record, proceedings, and evidence:

1. Application for a writ of habeas corpus, filed December 12, 1956.

2. Petition for leave to proceed in forma pauperis, filed December 12, 1956.

3. Motion for appointment of counsel to represent petitioner, filed December 12, 1956.

4. Motion for stay of execution of judgment and sentence, filed December 12, 1956.

5. Order allowing filing application for a writ of habeas corpus in forma pauperis, filed December 12, 1956.

6. Order appointing counsel to represent petitioner, filed December 12, 1956.

7. Order staying execution of judgment and sentence of death upon and against petitioner, filed December 12, 1956.

8. Order for respondent to show cause why a writ of habeas corpus should not be issued as prayed for, filed December 12, 1956.

9. Return to order to show cause, filed December 26, 1956.

10. Counter showing of petitioner to return to order to show cause, filed January 5, 1957.

[fol. 295] 11. Writ of habeas corpus, filed January 7, 1957.

12. Return to writ of habeas corpus, filed January 10, 1957.

13. Order setting hearing for February 20, 1957, filed January 10, 1957.

14. Motion of respondent for leave to withdraw rest, with attached exhibit and affidavit. filed February 28, 1957.

15. Motion of petitioner to withdraw his rest, with attached affidavits of counsel and of John R. Skinner, filed March 8, 1957.

16. Order granting leave to withdraw rest, filed March 9, 1957.

17. Transcript of the testimony.

18. Exhibits 1 to 19, inclusive.

19. Memorandum opinion, filed with Judge John W. Delehant, United States District Court (retired, serving by assignment), on June 27, 1957.

20. Order and judgment, filed July 29, 1957.

21. Application for certificate of probable cause, filed August 5, 1957.

22. Order granting certificate of probable cause, filed August 5, 1957.

23. Notice of appeal, filed August 27, 1957.

24. Cost bond, filed August 27, 1957.

25. Statement of points on appeal.

26. This designation.

CLARENCE S. BECK,
Attorney General
of Nebraska.

RALPH D. NELSON,
Assistant Attorney General
of Nebraska.

Attorneys for Respondent,
Appellant.

[fol. 298] (Docket Entries in District Court)

Loyd Carroll Grandsinger,
0265. vs. Civ.
Joseph E. Bovey, Warden, etc.

Date		Filings—Proceedings.
1956		
Dec.	12	1. Filed Order that the petitioner be and he hereby is given and granted leave to institute

EXHIBIT 15.

15
Exhibit No.
Lowell D. Walter, Reporter

EXHIBIT NO. 48
Lowell D. Walter Official Court Reporter
Sixteenth Judicial District in and
for Cherry County, Nebraska
Case No. Docket Page
Date Witness
Title of Case
Plaintiff
Defendant

99663

this proceeding and to prosecute it in this court only without the prepayment, or the giving of security for the payment of costs. (JWD)

Dec. 12 2. Filed Petition for Leave to Proceed In Forma Pauperis, with Affidavit in Support of Petition for Leave to proceed in Forma Pauperis attached.

Dec. 12 3. Filed Application for a Writ of Habeas Corpus. $5.00.

Dec. 12 4. Filed Motion for Appointment of Counsel to Represent Petitioner.

Dec. 12 5. Filed Unentitled Motion or Prayer for Stay of Execution of Judgment of Death Until the Final Determination of this Proceeding.

Dec. 12 6. Filed Order in which Respondent is ordered to show cause by December 26, 1956 why a Writ of Habeas Corpus should not be issued. Petitioner granted 10 days after the date of service of respondent's Return, within which to made and file a countershowing in opposition to such showing. (JWD)

Dec. 12 7. Filed Order appointing Eugene D. O'Sullivan, Sr. and Charles H. Flansburg as attorneys to represent the petitioner. (JWD)

Dec. 12 8. Filed Order staying the Execution of Judgment and Sentence of Death until the final determination of this proceeding. (JWD)

Dec. 12 Delivered to U. S. Marshal, District of Nebraska, certified copies of Orders, Nos. 6 and 8.

Dec. 12 9. Filed Proof of Mailing.

Dec. 14 Filed Returns of U. S. Marshal, attached as follows on:

10. Order directing Respondent to show cause; (Pleading No. 6)

11. Order Staying Execution of Judgment and Sentence of Death; (Pleading No. 8)

All served personally on Joseph B. Bovey, Warden and Loyd Carroll Grandsinger on December 12, 1956 at Nebraska State Penitentiary, Lincoln, Nebraska.

Signed by JESSE F. WHEELER,
Deputy.

Total Marshal's Costs $25.00.

Dec. 15 12. Filed Proof of Mailing of signed copies of Application for a Writ of Habeas Corpus. (Mailed to Attorneys in case)

Dec. 27 13. Entered Appearance of Counsel for the respondent, signed by Clarence S. Beck, Attorney General and Ralph D. Nelson, Assistant.

Dec. 27 14. Entered Return to Order to Show Cause, signed by Joseph B. Bovey, with Acknowledgment of Service signed by Charles H. Flansburg, Attorney for Petitioner.

Both pleadings i.e. 13 and 14 Filed District of Nebraska at 10:10 A.M., Dec. 26, 1956. Mary A. Mullen, Clerk, by EBP Deputy.

1957

Jan. 11 Entered 3 pleadings filed District of Nebraska, Mary A. Mullen, Clerk, by CHW Deputy, as follows:

15. Counter Showing of Petitioner to Respondent's Return to Order to Show Cause, showing Acknowledgment of Service. Exhibits "A", "B", "C" attached. (Filed Jan. 5, 1957)

16. Writ of Habeas Corpus, (JWD) (Filed Jan. 7, 1957) showing allowance of same.

17. Proof of Mailing/Writ of Habeas Corpus and the Court's Allowance thereof, pleading 16. (Filed/Jan. 7, 1957) true copy.

[fol. 299]

Jan. 11 On this 10th day of January, 1957 in Lincoln, Neb., before Hon. John W. Delehant Judge, is heard in this case pending matters in pursuance of the Writ of Habeas Corpus heretofore issued herein. The respondent Joseph B. Bovey produces in open court the body of the petitioner and makes and files his return in writing to said writ.

Petitioner is represented by Charles H. Flansburg, one of his attorneys by appointment of Court, and the respondent appears with Ralph D. Nelson, Assistant Attorney General of Nebraska. By agreement of counsel, it is

Ordered, by the Court, that the trial and hearing upon the issues herein be had before the Court at Lincoln, Nebraska and commencing at 10:00 A.M. on February 20, 1957.

Jan. 11 Entered 2 pleadings filed District of Nebraska Jan. 10, 1957. Mary A. Mullen, Clerk, By EBP and CHW Deputies, as follows:

18. Return to Writ of Habeas Corpus signed by Joseph B. Bovey, Warden, with Acknowledgment of Service.

19. Order that the trial and hearing upon the issues presented herein be had before the court at Lincoln, Nebraska, commencing at 10 o'clock a.m. on Wednesday, February 20, 1957. (JWD)

Jan. 12 20. Filed Proof of Mailing copies of Order, pleading 19.

Feb. 15 21. Entered Praecipe I for subpoenas behalf of respondent. (Filed District of Nebraska At 11:30 a.m. Feb. 14, 1957. Mary A. Mullen, Clerk, By EBP Deputy)

Feb. 15 Issued Subpoenas for witnesses Nos. 1 and 2 and delivered to U. S. Marshal, District of Nebraska.

1. Mrs. Frances Wells, Valentine, Nebraska.

2. Thomas H. Allan, Ralston, Nebraska.

Feb. 18 Filed 2 Returns of U. S. Marshal William Raab, signed by Jerome A. Langan, Deputy and Jesse F. Wheeler, Deputy, showing as follows:

22. Witness No. 1. Mrs. Frances Wells served personally at Valentine, Nebraska.

Marshal's Costs $43.70

23. Witness No. 2. Thomas H. Allan served at Ralston, Nebraska.

Marshal's Costs $ 2.30

Total Marshal's Costs $46.00

Mar. 5 Entered 2 pleadings as follows:

24. Respondent's Motion with Acknowledgment of Service and Notice of Motion setting hearing on March 5, 1957, at 10:00 A. M. in Lincoln, Nebr.

(Filed District of Nebraska, At 11:00 A. M., Feb. 28, 1957. Mary A. Mullen, Clerk, By EBP Deputy.)

25. Order rescheduling hearing on respondent's Motion for leave to withdraw his rest from March 5, 1957 to March 8, 1957, at 9:30 A.M. (JWD)

(Filed District of Nebraska, At Noon, Mar. 2, 1957, Mary A. Mullen, Clerk, By CHW Deputy)

Mar. 5 26. Filed Proof of Mailing.

[fol. 300]

Mar. 11 Entered 3 pleadings all filed District of Nebraska, Mar. 8, 1957. Mary A. Mullen, Clerk, By CHW Deputy, as follows:

27. Motion of Petitioner to Withdraw his Rest, to which is attached Exhibits A-M and B-M, and showing receipt of service which is signed by Ralph D. Nelson, Attorney for Respondent.

28. Resistance to Motion, signed by Charles H. Glansburg, Attorney for Petitioner, showing receipt of copy on March 8, 1957 signed by Ralph D. Nelson, Attorney for Respondent.

29. Praecipe for issuance of Subpoena behalf of petitioner for John R. Skinner to appear at U. S. District Court, Lincoln, Nebraska, March 23, 1957 at 9 o'clock a.m. (Subpoena issued and delivered to U. S. Marshal on March 11, 1957.)

Mar. 11 30. Entered Order in which is stated that the motion of respondent for leave to withdraw his rest is granted, and the motion of petitioner for leave to withdraw his rest is granted, etc., and this matter will be heard by the court in Lincoln, Nebraska, commencing at the hour of 9:00 o'clock A.M. March 23, 1957. (JWD) (Filed District of Nebraska at 10:55 A.M. Mar. 9, 1957. Mary A. Mullen, Clerk by CHW Deputy)

Mar. 11 31. Filed Proof of Mailing.

Mar. 13 32. Filed Return of U. S. Marshal, District of Nebraska on Subpoena showing John R. Skinner served personally.

WILLIAM RAAB,
U. S. Marshal.

Marshal's Costs $2.20

Mar. 16 33. Entered Praecipe for subpoenas behalf of respondent. (Filed District of Nebraska At 4:00 P. M., Mar. 15, 1957. Mary A. Mullen, Clerk, By EBP Deputy)

Mar. 18 Issued Subpoenas for witnesses Nos. 4, 5 and 6 and delivered to U. S. Marshal, District of Nebraska.

Mar. 19 34. Entered Praecipe for subpoena behalf of respondent. (Filed District of Nebraska At 11:30 A.M. Mar. 18, 1957. Mary A. Mullen, Clerk, By EBP Deputy)

Mar. 19 Issued Subpoena for witness No. 7 and delivered to U. S. Marshal.

Mar. 22 Filed 4 Returns of U. S. Marshal William Raab, signed by Earl W. Sweeney, Deputy and Jesse F. Wheeler, Deputy, showing Subpoenas served on March 20, 1957, on the following:

35. Witness #4 Francis Dale Shepperd, served personally ...Marl's Costs $41.30

36. Witness #5 Frank Richardson, served personally .....Marl's Costs $ .50

37. Witness #6 D. C. Evans, served personally .....Marl's Costs $ .50

38. Witness #7 Thomas H. Allan, served personally .....Marl's Costs $ .50

Total Marshal's Costs $42.80

[fol. 301]

Feb. 25 On this 20th. day of February 1957 in Lincoln, Nebraska before Hon. John W. Delehant Judge, this cause comes on regularly for trial to the Court.

—

The petitioner, Loyd Carroll Grandsinger appearing by Charles Flansburg and Eugene D. O'Sullivan, Sr., his attorneys.

The respondent, Joseph B. Bovey Warden, Nebraska State Penitentiary, appearing by Ralph Nelson Assistant Attorney General of Nebraska and Rush D. Clark his attorneys.

Opening Statements are made by the respective attorneys, testimony is adduced, the following witnesses are sworn and testify on behalf of the petitioner:

1. Loyd Carroll Grandsinger
2. Dale Shepperd
3. Fritz J. Brandenburg
4. Paul Grandsinger

The trial of said cause not being concluded at the hour of adjournment, further proceedings herein are adjourned until Tuesday, February 21, 1957, at 9:30 A.M.

Feb. 25 On this 21st. day of February, 1957, in Lincoln, Nebr., again come the parties hereto by their respective attorneys.

Further evidence is heard. The following witnesses are sworn and testify:

on behalf of the Petitioner:

Debbie Didier

Petitioner rests.

The following are sworn and testify on behalf of the respondent:

1. Frances H. Bloom
2. Ben F. Wilkinson
3. Jack Knudtson
4. William C. Freeman
5. G. H. Reis
6. Thos. H. Allan
7. Harold D. Smith
8. Lynn V. Parks
9. Curtis Cochran
10. Rush D. Clark

By agreement of counsel, it is

Parties rest

Ordered, by the Court that final submission be upon written briefs, the Petitioner having submitted his brief, the respondent is granted 10 days from this date within which to submit his brief and the petitioner is then granted 10 days after receipt of respondent's brief within which to reply. The Court will then fix a date for the hearing of oral argument.

Mar. 11 On this 8th day of March, 1957, before Hon. John W. Delehant, Chief Judge, in Lincoln, Nebraska, is heard in this case motion of the respondent to withdraw his rest and motion of petitioner to withdraw his rest and the issues having been duly presented to the Court by Charles H. Flansburg and Eugene D. O'Sullivan Attorneys for the petitioner and Ralph D. Nelson, Assistant Attorney General of Nebraska Attorney for the respondent and the Court being fully advised in the premises.

It Is Ordered And Adjudged as follows:

that the motions of both parties herein be and they hereby are approved and allowed and that supplemental trial for the limited purpose of the submission of evidence referred to in the motions be held in Lincoln on March 23, 1957 beginning at 9:00 A.M.;

that Mr. Flansburg prepare and submit the formal order.

Mar. 25 On this 23rd. day of March, 1957, in Lincoln, Nebraska before Hon. John W. Delehant Judge, again come the parties hereto by their respective attorneys.

Further evidence is heard. John R. Skinner is sworn and testifies on behalf of the petitioner. Petitioner rests. Francis Dale Shepperd is recalled to the stand on behalf of the respondent.

[fol. 302]

Mar. 25 The following witnesses are sworn and testify on behalf of the respondent:

1. Ervin R. Schottler
2. Donald Clair Evans
3. Allen Eugene Bligh
4. Frank Richardson

Parties rest.

It is Ordered, by the Court that further submission be upon supplementary briefs, the Petitioner to submit his reply brief on or before March 27, 1957, the Respondent to serve his brief on or before April 1, 1957 and the Petitioner is then allowed if he so desires, an additional 5 days within which to reply; that oral argument be heard at a date to be fixed by the Court.

Apr. 29 On this 27th. day of April, 1957, in Lincoln, Nebraska, before Hon. John W. Delehant, Chief Judge, again come the parties hereto, the petitioner Loyd Carroll Grandsinger by his attorney Charles Flansburg, and the Respondent Joseph B. Bovey, Warden, by Ralph Nelson, Assistant Attorney General of Nebraska, for continued trial to the Court.

Oral argument of Attorneys is heard, and it is Ordered by the Court, that the case is submitted and taken under advisement.

June 28 Entered pleading filed in accordance with Rule 5(e) of Rules of Civil Procedure for the District Courts of the United States, with Hon. John W. Delehant, Judge, Retired, serving by assignment, on June 27, 1957, as follows:

39. Memorandum. (JWD)

June 28 40. Filed Proof of Mailing copies of Memorandum.

July 30 41. Entered Order and Judgment signed by John W. Delehant, United States District Judge, Retired, Serving by Assignment, and showing approval as to form signed by the following:

C. S. Beck,
Ralph D. Nelson,
Attorneys for Respondent

Eugene D. O'Sullivan, Sr.
Charles H. Flansburg
Attorneys for Petitioner

(Filed District of Nebraska At 2:00 P.M. Jul. 29, 1957. Mary A. Mullen, Clerk, by CHW Deputy)

July 30 42. Filed Proof of Mailing certified copies of foregoing Order and Judgment.

Aug. 6 Entered 2 pleadings filed District of Nebraska At 12—Noon, Aug. 5, 1957. Mary A. Mullen, Clerk, By EBP Deputy, as follows:

43. Respondent's Application for Certificate of Payable Cause.

44. Order, in which,

It Is Therefore Considered And Ordered:

That a certificate of probable cause for appeal in this cause be and it hereby is granted; that it be, and it hereby is certified, that probable cause exists for an appeal by the respondent to the United States Court of Appeals for the Eighth Circuit from the Order and Judgment of this Court made and entered on July 29, 1957.

That, so far as may be required or proper, such appeal be allowed and the right thereto granted; etc. (JWD)

Aug. 6 45. Filed Proof of Mailing copies of Order.

Aug. 16 Filed 2 Transcripts of proceedings at Lincoln, Nebraska, on January 10, February 21, and March 23, 1957, as follows:

46. Volume 1 of 3 Volumes, Pages 1 to 205. (copy)

47. Volume 2 of 3 Volumes, Pages 206 to 420. (copy)

[fol. 303]

Aug. 28 Entered 2 pleadings filed District of Nebraska At 1:40 P.M. Aug. 27, 1957. Mary A. Mullen, Clerk, By EBP Deputy, as follows:

48. Notice of Appeal behalf of Respondent. $5.00.

49. Cost Bond of Joseph B. Bovey, Warden, Nebraska State Penitentiary in the sum of $250.00, with Universal Surety Company of Lincoln, Nebraska, a corporation, as surety.

Aug. 28 50. Filed Proof of Mailing copies of Notice of Appeal.

Sept. 6 Entered 2 pleadings filed District of Nebraska at 11:00 a.m. Sep. 5, 1957. Mary A. Mullen, Clerk. By EBP Deputy, both signed by Attorneys for Respondent and show Acknowledgment of Service, as follows:

51. Statement of Points on Appeal.

52. Designation of Contents of Record on Appeal.

[fol. 304] United States of America,
District of Nebraska—ss.:

I, Mary A. Mullen, Clerk of the United States District Court for the District of Nebraska, do hereby certify the foregoing to be a true and correct copy of Docket Entries, up to and including September 6, 1957, in

Loyd Carroll Grandsinger, Petitioner,
No. 0265. vs. Civ.
(B.)
Joseph E. Bovey, Warden, Nebraska State Penitentiary, Respondent.

as the same appears of record in my office.

Witness my hand and seal of said Court at Omaha in said district this 12th day of September, 1957.

Seal
U. S. Dist. Court
Dist. of Neb.

MARY A. MULLEN,
Clerk.
By Jessie Brandell,
Deputy.

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In The

Supreme Court of the United States

October Term, 1957

No. 1013

JOSEPH E. BOVEY, Warden, Nebraska State Penitentiary, PETITIONER,

V.

LOYD CARROLL GRANDSINGER, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

CLARENCE S. BECK,
Attorney General,
RALPH D. NELSON,
Special Assistant Attorney General,
2119 State House,
Lincoln 9, Nebraska,
Counsel for Petitioner.

WEKESSER PUBLISHING CO., Law Briefs, Lincoln, Nebr.

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In The

Supreme Court of the United States

October Term, 1957

No. .....

JOSEPH E. BOVEY, Warden, Nebraska State Penitentiary, PETITIONER,

V.

LOYD CARROLL GRANDSINGER, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Joseph E. Bovey, Warden, Nebraska State Penitentiary, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in above-entitled case on April 7, 1958.

CITATIONS TO OPINIONS BELOW.

The opinion of the United States District Court for the District of Nebraska is reported in 153 F. Supp. 201. The opinion of the United States Court of Appeals for the Eighth Circuit is in the case of *Joseph*

E. Bovey, Warden, Nebraska State Penitentiary, Appellant vs. Loyd Carroll Grandsinger, Appellee, No. 15,884, September Term, 1957. April 7, 1958, — F. 2d —.

JURISDICTION.

The opinion of the United States Court of Appeals was filed on April 7, 1958, and judgment was entered on that same day. On April 25, 1958, the United States Court of Appeals for the Eighth Circuit entered an order that on consideration of the motion of the appellant Joseph E. Bovey, Warden, Nebraska State Penitentiary, for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, the issuance of the mandate is stayed for a period of thirty days, and if within said period of thirty days there is filed with the Clerk of the United States Court of Appeals for the Eighth Circuit a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. The jurisdiction of this court is invoked under 28 U. S. C. Section 1254 (1).

This cause had its origin in the District Court of Cherry County, Nebraska, where on June 16, 1954, a jury found Loyd Carroll Grandsinger guilty of murder in the first degree and fixed the penalty at death (R. 10, 27, 29). On December 16, 1955, the Supreme Court of Nebraska affirmed the judgment of the District Court of Cherry County, Nebraska (R. 11, 32), the written opinion of Supreme Court of Nebraska being reported in 161 Neb. 419, 73 N. W. 2d 632. On

October 22, 1956, the United States Supreme Court entered an order denying a petition for writ of certiorari (R. 14, 47). *Grandsinger* v. *State of Nebraska*, 352 U. S. 880.

Loyd Carroll Grandsinger, the respondent herein, then filed his application for a writ of habeas corpus in the United States District Court for the District of Nebraska (R. 1) setting forth that he was imprisoned by Joseph E. Bovey, Warden, Nebraska State Penitentiary, under the terms of a judgment and conviction alleged to be null and void on the grounds that during his trial in the state court there was a denial of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution because of misconduct on the part of one of his two attorneys.

QUESTIONS PRESENTED.

1. Was the respondent denied due process under the Fourteenth Amendment to the United States Constitution, where his father, in behalf and with approval, had employed two recognized and experienced attorneys to represent him, where one of these attorneys altered a prosecution exhibit, and this action was brought to the attention of the jury, where this respondent continued to have the services of this attorney for almost two years thereafter, until after his judgment of conviction had been affirmed by the Supreme Court of Nebraska, and where, upon his subsequent habeas corpus proceeding in the United States District Court, this respondent testified, but did not repudiate the act of his trial counsel?

2. Does the due process clause of the Fourteenth Amendment incorporate as such, the specific guaran-

tees in the Sixth Amendment of the United States Constitution with reference to the assistance of counsel for an accused in a criminal prosecution?

3. Is an attorney employed by an accused for his defense in a state criminal proceeding an officer of the state so as to make his action state action for purposes of the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED.

Constitution of the United States of America, Article XIV, Section 1:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law: * * *."

STATEMENT OF THE CASE.

The respondent Loyd Carroll Grandsinger was charged with the crime of first degree murder in the shooting of Marvin Hansen, a member of the Nebraska Safety Patrol, on or about April 8, 1954, in Cherry County, Nebraska (R. 19). Loyd Carroll Grandsinger, born in Valentine, Nebraska, and raised on a farm in South Dakota (R. 203), had been living in Los Angeles, California, and had left there for Nebraska on April 3, 1954, with his brother Leon, after taking a .22 caliber pistol. On the trip to Nebraska another car was taken in Wyoming, other cars were prowled, and on April 7, 1954, the Grandsingers had broken into a post office and store in Wewela, South Dakota (R. 207-218).

On the night of April 8, 1954, with Leon Grandsinger driving one car towing a car driven by the respondent Loyd Carroll Grandsinger, the brothers were stopped near Valentine, Nebraska, by Cherry County Sheriff William C. Freeman and by Patrolman Marvin Hansen (R. 204, 240). Both officers had Smith & Wesson .38 revolvers (R. 240). While Leon Grandsinger was getting out of the front car and backing up towards Sheriff Freeman, the Sheriff heard a car door and noise at the second car (R. 240). He heard the occupant of that car start running, heard Patrolman Hansen holler "Stop" and there was a pause, Hansen said "Get up," and there was a shot which the Sheriff said was a .22 (R. 240), followed by other shots, both .38's and .22's. Marvin Hansen was killed, with the medical opinion being that the cause of death was a massive loss of blood due to a bullet wound through the aorta, which could have been produced by a .22 caliber and could not have been caused by a .38 caliber bullet (R. 242). Loyd Carroll Grandsinger was apprehended the next day. Exhibit 11, Patrolman Hansen's Sam Browne Belt was in evidence, and there was testimony that the holes found in the belt in the outer flap, and in the belt proper, could not have been made by a .38 caliber bullet, but could have been made by a .22 caliber bullet (R. 247). Also in evidence was Exhibit 10, Patrolman Hansen's pants belt. Two written statements taken from Loyd Carroll Grandsinger were also in evidence in the trial in the District Court of Cherry County, Nebraska (R. 207-218, R. 221-224). It was the contention of the State of Nebraska at the trial in the District Court of Cherry County, Nebraska, that Patrolman Marvin Hansen's death was caused by a wound produced by a .22 caliber bullet, that Loyd Carroll Grandsinger

had in his possession at the time of the shooting a .22 caliber pistol and that he shot Hansen with this pistol.

Two attorneys, William C. Heelan, of Valentine, Nebraska, and Charles A. Fisher, of Chadron, Nebraska, were employed for Loyd Carroll Grandsinger by his father (R. 206). On the tenth day of the trial, Rush C. Clarke, an attorney appointed by the court to assist in the prosecution, was in the District Judge's chambers with defense counsel Heelan and the presiding judge (R. 237). The Cherry County Attorney and defense counsel Charles A. Fisher came into the chambers, and there was a conference after which these proceedings took place before the jury before the case was submitted to the jury:

" 'By Mr. Clarke:

"Before we proceed with the arguments, Your Honor, there is a matter that has been taken up with, Your Honor, which we wish to get into the record.

"The Court: Very well.

"Mr. Clarke: We wish the record to show that counsel for the defendant, is willing that it shall show, that this morning in this court room, after the court reporter had brought all of the exhibits in the case out and laid them on the reporter's desk, Mr. Fisher, one of the counsel for the defendant, while he was examining Exhibit No. 10, being the leather pants belt heretofore identified as the belt of Marvin Hansen, and that at that time he took a dowel, being one of the wooden dowels on the reporter's desk, and being either the same or one exactly like the one I am holding in my hand, which I will have to have marked as an exhibit, and pushed it violently—

"Mr. Fisher: (Interrupting) I didn't violently push it—

"Mr. Clarke: (Interrupting) pushed it through the hole in the belt hard enough so that it materially enlarged the (fol. 207) size of the hole to an extent which cannot now be determined and that the belt, Exhibit No. 10, is not now in the same condition as it was when it was offered in evidence and received in evidence, and that the hole is now materially larger than it was before Mr. Fisher did that.

(Mark this dowel as an exhibit, please.)

(The wooden dowel refered to was marked as Exhibit No. 75.)

"The Court: Mr. Fisher, as I understand it you have told counsel that you did that?

"Mr. Fisher: Yes.

"The Court: You recognize that the hole is larger?

"Mr. Fisher: Yes.

"The Court: The court admonishes all counsel and everyone else and the jury when they go out to deliberate upon this matter to not probe these exhibits. They can make comparisons but they cannot probe these belts with any dowel, or change the condition of any exhibits. Very well, you may proceed.'"

On June 16, 1954, the jury returned a verdict of guilty of murder in the first degree and fixed the penalty at death (R. 10, 27, 29).

Defense counsel William C. Heelan died thereafter (R. 206), and Charles A. Fisher continued to represent Loyd Carroll Grandsinger. On December 16, 1955,

the Supreme Court of Nebraska affirmed the judgment of the District Court of Cherry County, Nebraska (R. 11, 32). After a motion for rehearing was overruled (R. 11), on April 30, 1956, Loyd Carroll Grandsinger filed with the Supreme Court of Nebraska a notice of dismissal of Charles A. Fisher as his counsel and of retention of Eugene D. O'Sullivan, Sr., of Omaha, Nebraska, as his counsel (R. 12, 41, 42). A second motion for rehearing was filed, in which it was contended that confessed criminal misconduct of chief defense counsel, Charles A. Fisher, deprived the respondent of the effective and unqualified representation of counsel required in state capital cases by the Fourteenth Amendment of the United States (R. 12, 42-45). This motion was overruled on June 30, 1956, (R. 13, 46). On July 9, 1956, respondent filed a petition for a writ of certiorari to the Supreme Court of the State of Nebraska with the Supreme Court of the United States (R. 14, 93), in which the same question of effective assistance of counsel was raised (R. 14, 93). On October 22, 1956, the United States Supreme Court entered an order denying the petition for writ of certiorari (R. 14, 47), *Grandsinger* v. *State of Nebraska*, 352 U. S. 880.

Loyd Carroll Grandsinger then filed his application in the United States District Court for the District of Nebraska contending that his judgment and sentence was null and void because during his trial for first degree murder a conflict of interest arose which destroyed his trial counsel's ability effectively to represent him, and due to this conflict of interest he was deprived of the effective and unqualified representation of counsel which the Fourteenth Amendment to the United States Constitution commands to be af-

forded to a defendant in a state capital case (R. 1-4). It was alleged that his chief counsel was caught tampering with a prosecution exhibit, the pants belt, that his counsel permitted his misconduct to be brought to the jury's attention, and that his counsel's willingness to have this conduct brought to the jury's attention was a flagrant violation of duties counsel owed to him. In the opinion of the United States District Court (R. 114, 178, 179), the court said that Loyd Carroll Grandsinger had been denied effective assistance of counsel contrary to Constitutional guarantees by the action of his counsel, and held that the judgment and sentence is void (R. 179, 180). Grandsinger was left subject to custody under the information filed by the State of Nebraska in the District Court of Cherry County charging him with commission of murder in the first degree and to eventual and timely trial (R. 180). Upon appeal to the United States Court of Appeals for the Eighth Circuit, that court on April 7, 1958, affirmed the judgment appealed from.

REASONS FOR GRANTING THE WRIT.

Loyd Carroll Grandsinger, the respondent, was charged with first degree murder, and his father, in his behalf and with his approval, employed two recognized and experienced attorneys to represent him (R. 170). One of these attorneys, on the tenth day of the trial, for what reason, if any, is not disclosed, altered an exhibit, and the circumstances were brought to the attention of the jury. This was done without the prosecuting attorney or the trial judge indicating directly or indirectly that the act of this defense counsel was done for any improper purpose. The

facts were given to the jury without the defense counsel being reprimanded, condemned, or charged with attempting to hinder justice. Loyd Carroll Grandsinger continued to have this same attorney while proceedings to review his conviction were had in the Nebraska Supreme Court, he chose to dismiss his counsel and put him on trial, and by an attack upon his counsel, to set aside his own conviction. The attorney concerned was dismissed, but not until there had been at least an acquiescence of almost two years. In the opinion of the United States District Court, the court stated that the respondent is alert and intelligent in appearance, and he readily and clearly understands and uses the English language (R. 140). He had completed grade school courses and between one and two years of high school courses (R. 140). He had never been in a trial before, but he had been in court before and plead guilty (R. 206). When he testified in the federal court in his habeas corpus action he had the opportunity for repudiation, for denial, for accusation. He said only that he did not consent to having his motion for new trial heard and ruled on the same day the verdict was returned and he was sentenced (R. 207).

It is submitted that there is an important question of federal law which should be settled by this Court, and that the Court of Appeals has rendered a decision in conflict with decisions of other courts of appeal on the same matter.

QUESTION 1.

The United States District Court for the District of Nebraska and the United States of Appeals for the

Eighth Circuit have held that there is a denial of due process under the Fourteenth Amendment to the United States Constitution where a defendant in a state criminal proceedings has had counsel of his selection, where this counsel has altered a prosecution exhibit, where the defendant had continued the services of his counsel for almost two years, and where this defendant has not testified that the questioned act of his counsel was not authorized or permitted by him.

This decision is in conflict with decisions of other courts of appeals. One such conflicting decision is *Tompsett* v. *State of Ohio*, 6 Cir., 146 F. 2d 95, certiorari denied 324 U. S. 869. It was held:

> "The concept of this rule is that the lack of skill and incompentency of the attorney is imputed to the defendant who employed him, the acts of the attorney thus becoming those of his client and so recognized and accepted by the court, unless the defendant repudiates them by making known to the court at the time his objection to or lack of concurrence in them. A defendant cannot seemingly acquiesce in his attorney's defense of him or lack of it and, after the trial has resulted adversely to defendant, obtain a new trial because of the incompetency, negligence, fraud or unskillfulness of his attorney."

In *United States ex rel. Darcy* v. *Handy*, 3 Cir., 203 F. 2d 407, certiorari denied, 346 U. S. 865, the court held that allegations of a petition with respect to relator's trial counsel's lack of diligence and competency, even if proved, would not afford basis for the issuance of the writ of habeas corpus. It was said:

> "* * **It necessarily follows that any lack of skill or competency of counsel must in these cir-

> cumstances be imputed to the defendant who employed him rather than to the state, the acts of counsel thus becoming those of his client and such so recognized and accepted by the court unless the defendant repudiates them by making known to the court at the time his objection to or lack of concurrence in them. A defendant cannot seemingly acquiesce in his counsel's defense of him or lack of it and, after the trial has resulted adversely, have the judgment set aside because of the alleged incompetence, negligence or lack of skill of that counsel,"

It was noted in this opinion that there may be circumstances where the representation of a defendant by his counsel is so lacking in competence or good faith that it could be the duty of the trial judge or prosecutor to observe and correct it. However, in this case, the officers of Nebraska were compelled to bring certain facts before the jury which they did without condemning or reprimanding counsel, and counsel continued to represent Loyd Carroll Grandsinger for almost two years before being dismissed. And even in the habeas corpus proceedings, this respondent did not repudiate the action of his trial counsel by making known to the United States District Court his objection to or lack of concurrence in that action.

In *Andrews* v. *Robertson*, 5 Cir., 145 F. 2d 101, certiorari denied, 324 U. S. 874, the court said:

> "The Federal Court, in habeas corpus proceedings, cannot set itself up as the admeasurer of the legal capacity of counsel of defendant's own selection in the trial of a case in the State Court to the end that the defendant may put his own counsel on trial after the end of his own has been reached."

In *Miller* v. *Hudspeth*, 10 Cir., 176 F. 2d 111, the petitioner, who had been sentenced to death in Kansas for the murder of a police officer, alleged in a habeas corpus proceeding that his attorney was so wholly incompetent that in fact and in law he was not represented by counsel as contemplated by the Federal Constitution. The opinion reads:

> "* * * A new trial may not be declared and a petitioner may not be released from custody because of mistakes on the part of his counsel. If the test to be applied depended upon the skill with which a defendant was represented, there never would be any finality to a trial * * *."

QUESTION 2.

The Sixth Amendment of the United States Constitution provides that an accused shall in criminal prosecutions have the assistance of counsel for his defense. This specifically applies to the federal courts, as noted in *Johnson* v. *Zerbst*, 304 U. S. 458, and in *Glasser* v. *United States*, 315 U. S. 60. A state prosecution was involved in the leading case of *Powell* v. *Alabama*, 287 U. S. 45, in which defendants were ignorant, illiterate, inexperienced and friendless Negro boys who were charged with the rape of white girls. From the time of arraignment until the beginning of their trial they did not have the aid of counsel, since no lawyer was appointed by the court until the morning of the trial. The question was:

> "* * * We confine ourselves * * * to the inquiry whether the defendants were in substance denied the right of counsel, and if so, whether such denial infringes the due process clause of the Fourteenth Amendment."

The opinion did not say that the due process concept of the Fourteenth Amendment incorporates the specific guarantees of counsel expressed in the Sixth Amendment. The opinion reads:

> "* * * All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case * * *."

The limitations of the Sixth Amendment as to federal prosecutions were also expressed in *Betts* v. *Brady*, 316 U. S. 455.

QUESTION 3.

The decision below is in conflict with decisions of other courts of appeals on another point, for it has been held in other courts that an attorney for an accused in a state criminal proceeding is not an officer of the state so as to make his action state action for purposes of the Fourteenth Amendment to the United States Constitution. This conclusion was reached in *Berg* v. *Cranor*, 9 Cir., 209 F. 2d 567, and in *United States ex rel. Darcy* v. *Handy*, 3 Cir., 203 F. 2d 407, certiorari denied, 346 U. S. 865, in the separate opinion of Circuit Judge Maris.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CLARENCE S. BECK,
Attorney General of Nebraska
RALPH D. NELSON,
Special Assistant Attorney
General of Nebraska
2119 State House
Lincoln 9, Nebraska
Attorneys for Petitioner.

APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

No. 15,884.

Joseph E. Bovey, Warden, Nebraska State Penitentiary, Appellant,

vs.

Loyd Carroll Grandsinger, Appellee.

Appeal from the United States District Court for the District of Nebraska.

[April 7, 1958.]

Ralph D. Nelson, Assistant Attorney General of Nebraska, (Clarence S. Beck, Attorney General of Nebraska, was with him on the brief) for Appellant

Charles H. Flansburg (Eugene D. O'Sullivan, Sr., was with him on the brief) for Appellee.

Before SANBORN, WOODROUGH and VOGEL, Circuit Judges

SANBORN, Circuit, Judge.

This is an appeal by the Warden of the Nebraska State Penitentiary from a judgment in a habeas corpus

proceeding brought by Loyd Carroll Grandsinger, an inmate of that institution, held under a sentence of death imposed by the District Court of Cherry County, Nebraska, on June 16, 1954. The sentence was based upon the verdict of a jury finding him guilty of first-degree murder in the shooting and killing, on April 8, 1954, of Marvin Hansen, an officer of the State Safety Patrol, and fixing death as the penalty. On review, the Supreme Court of Nebraska affirmed the conviction and sentence. *Grandsinger* v. *State,* 161 Neb. 419, 73 N.W.2d 632.

The judgment appealed from determined that at Grandsinger's trial he had been denied effective representation by counsel, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, and that his sentence and the death warrant under which he was confined were therefore void.

In his petition for release on habeas corpus, filed in forma pauperis, Grandsinger (represented by counsel appointed for him by the District Court, who have also represented him in this Court) asserted that he had exhausted his remedies in the courts of the State of Nebraska; that at his trial in the District Court of Cherry County, Nebraska, his constitutional rights under the due process clause of the Fourteenth Amendment were violated: (1) in that coerced and involuntary confessions made by him between the time of his apprehension and the time he was given a preliminary hearing were received in evidence at his trial; and (2) because of an occurrence which took place on the last day of the trial, involving his chief trial counsel, the Special Prosecutor for the State, and the State trial judge,

Grandsinger was deprived of effective representation by counsel.

The issues raised by the petition, the return of the Warden to an order to show cause, and the counter showing made by Grandsinger, were tried before Judge John W. Delehant, of the United States District Court for the District of Nebraska. In an exhaustive opinion (*Grandsinger* v. *Bovey*, 153 F.Supp. 201), setting forth with meticulous accuracy every proceeding, fact, matter and thing which had any bearing upon the questions presented to him, the Judge decided: (1) that Grandsinger had exhausted his State remedies (page 217 of 153 F.Supp.); (2) that the admission in evidence at his trial of his allegedly coerced confessions had not violated his constitutional rights under the due process clause of the Fourteenth Amendment (pages 226-229 of 153 F.Supp.); and (3) that the occurrence at the trial upon which Grandsinger based his claim that he was deprived of the effective representation of his counsel, did have that result and vitiated his conviction and the sentence imposed upon him (pages 239-240 of 153 F.Supp.).

The judgment from which this appeal is taken was entered July 29, 1957. It declared that the death sentence imposed upon Grandsinger was unconstitutional and void. It enjoined the execution of the sentence and discharged him from custody in so far as that depended upon the sentence and a death warrant issued by the Supreme Court of Nebraska on October 29, 1956. The judgment provided that custody of Grandsinger should be retained by the Warden pending review of the federal court judgment, and that the County of Cherry, State of Nebraska, should have six months from the date of the completion of review proceedings within

which to retry Grandsinger, and provided for his continued custody during the retrial, and for his release in case there was no retrial.

The facts, inferences and the law upon which Judge Delehant based his conclusion that Grandsinger at his trial was deprived of his constitutional right to the effective assistance of counsel are fully set forth in his opinion, on pages 230-240 of 153 F.Supp.

The record on appeal shows that at Grandsinger's trial for murder in the first degree, he was represented by William C. Heelan and Charles A. Fisher, of the Nebraska bar, who had been retained by Grandsinger's father to defend him. Mr. Fisher was the principal trial attorney. Rush C. Clarke, as special prosecutor, represented the State. The trial, which had opened on June 5, 1954, was concluded on June 15. It appeared that at the time of the shooting of Marvin Hansen, near midnight of April 8, 1954, Loyd Grandsinger and his brother Leon were armed with .22-caliber pistols or revolvers. Leon was driving an automobile which they had stolen in Wyoming, and was towing an old Ford car belonging to Loyd Grandsinger, which he was guiding. The Grandsingers, on their way east from California, had committed various thefts, aside from the stealing of the automobile which was being driven by Leon, and had apparently burglarized, the night before a store and post office at Wewela, South Dakota.

The Sheriff of Cherry County, Nebraska, had been informed as to the proposed movements of the Grandsingers on the night of April 8. Accompanied by officer Hansen in an automobile, the Sheriff overtook the Grandsingers on Highway 7 in Cherry County, and undertook to arrest them. The Sheriff took Leon Grand-

singer into custody without difficulty and with no shots having been fired. Loyd left the right side of the towed automobile and sought to escape in the darkness. Hansen undertook to capture him. Shots were fired, and shortly thereafter Hansen was found, fatally wounded by a bullet which it was later discovered had pierced both the Sam Brown belt and the pants belt which he was wearing. Loyd Grandsinger fled from the scene of the shooting, but was captured by a posse the following day.

The State of Nebraska charged, and undertook to prove at the trial, that the only gun which could possibly have been used to kill Marvin Hansen was that in the possession of Loyd Grandsinger. Both the Sheriff and Hansen carried .38-caliber revolvers. The belts worn by Hansen when he was shot were introduced in evidence. The bullet holes in the belts showed that he had not been shot by his own gun or that of the Sheriff. The medical evidence was to the effect that Hansen's death was caused by a small-caliber bullet.

It is safe to say that, in view of the State's evidence, no man ever stood in greater need of the effective aid and assistance of counsel than did Loyd Grandsinger at the close of the evidence. Apparently his only hope was that the jury might convict him of manslaughter or might, if it found him guilty of murder in the first degree, fix the penalty at life imprisonment instead of death. The likelihood of his acquittal was virtually nonexistent. Then occurred the almost incredible events which Judge Delehant concluded resulted in depriving Loyd Grandsinger of effective representation by his trial counsel.

Mr. Fisher, prior to the appearance of the jury on the last day of the trial, but after the exhibits had been

brought into the courtroom, was discovered by the County Attorney of Cherry County materially enlarging, by the use of a dowel, the bullet hole in the pants belt worn by Hansen when he was shot. Mr. Fisher was taken into the trial judge's chambers. What transpired there is not shown, but can readily be inferred. Thereafter the following record was made by the Special Prosecutor, with the acquiescence of the trial judge and of Mr. Fisher, in the presence and hearing of the jury, immediately before the closing arguments in the case:

"By Mr. Clarke [the Special Prosecutor]:

"Before we proceed with the arguments, your Honor, there is a matter that has been taken up with Your Honor, which we wish to get into the record.

"The Court: Very well.

"Mr. Clarke: We wish the record to show that counsel for the defendant, is willing that it shall show, that this morning in this court room, after the court reporter had brought all the exhibits in the case out and laid them on the reporter's desk, Mr. Fisher, one of the counsel for the defendant, while he was examining Exhibit No. 10, being the leather pants belt heretofore identified as the belt of Marvin Hansen, and that at that time he took a dowel, being one of the wooden dowels on the reporter's desk, and being either the same or one exactly like the one I am holding in my hand, which I will have to have marked as an exhibit, and pushed it violently——

"Mr. Fisher: (interrupting) I didn't violently push it—

"Mr. Clarke: (Interrupting) pushed it through the hole in the belt hard enough so that it materially enlarged the size of the hole to an extent which cannot now be determined and that the belt, Ex-

hibit No. 10, is not now in the same condition as it was when it was offered in evidence, and received in evidence, and that the hole is now materially larger than it was before Mr. Fisher did that.

"(Mark this dowel as an exhibit, please.)

"(The wooden dowel referred to was marked as Exhibit No. 75.)

"The Court: Mr. Fisher, as I understand it you have told counsel that you did that?

"Mr. Fisher: Yes.

"The Court: You recognize that the hole is larger?

"Mr. Fisher: Yes.

"The Court: The court admonishes all counsel and everyone else and the jury when they go to deliberate upon this matter to not probe these exhibits. They can make comparisons but they cannot probe these belts with any dowel, or change the condition of any exhibits. Very well, you may proceed."

Judge Delehant found that Loyd Grandsinger had not seen, and did not know of, Mr. Fisher's misconduct, had not participated in the proceedings relative thereto which took place in the trial judge's chambers, and was not shown to have participated in or to have given his approval of the statement the special prosecutor made a matter of record in the jury's presence.

Judge Delehant's appraisal of these events and of their effect upon the trial of Loyd Grandsinger is graphically stated by him as follows (pages 235-236 of 153 F.Supp.):

"From that ordeal in chambers, Mr. Fisher emerged manifestly beaten and crushed. What immediately ensued leaves no doubt on that score. For the state's special prosecutor, eager for the kill and with his wounded victim all too plainly ac-

quiescent, at once set the stage and in the presence of the jury that was so shortly to pass on the petitioner's guilt and right to continue to live, recounted, and made Mr. Fisher to admit, the latter's shameful act. And Mr. Fisher readily acknowledged it with only a minor haggling over a single word, and that, in the circumstances, not really important. Nor can it be forgotten that this occurred in the presence and with the ostensible approval, however reluctantly given, of the trial judge, a matter of no little significance to the jury.

"While it has been argued on the present submission that only petitioner's own counsel not provided by the state but employed by his father in his behalf, transgressed, and the State of Nebraska was without fault, there is no virtue in that position. It can hardly have been advanced sincerely. For, once Mr. Fisher had been overtaken in his misconduct, Mr. Clarke, who appeared and prosecuted specially for the State of Nebraska and, therefore, acted in its behalf, became the aggressor and, with studied and much too evident purpose, turned Mr. Fisher's wrong into an incident dramatically publicized in the jury's presence, to Mr. Fisher's humiliation and disgrace and petitioner's immense peril. It does not lie now with the State of Nebraska smugly and falsely to exclaim 'Shake not they gory locks at me, nor say I did it'. Moreover, the position of the state is not wholly clear, insofar as it is rooted in the action of the trial judge. He presided over the trial, including the dragging of the errant Mr. Fisher before the jury. And he may not be wholly absolved from responsibility for the record that was then made. It is true that he was confronted with a hard choice for whose precipitation he was not at all responsible. But, whether from the standpoint of the special prosecutor or from that of the trial judge, the loss of two weeks of valuable trial time, even the haz-

ard of the erection of a double jeopardy defense or any other allowable alternative, might well have been preferred to that which actually was done to the already hard pressed petitioner.

"In that instant and by that display, what had theretofore been an orderly trial was perverted into a virtual legal lynching. From that time forward, Mr. Fisher stood discredited before the jury in respect of petitioner's case. The argument he was shortly to make was stripped of its persuasiveness and effectively damned in the jury's estimation; for his acknowledged trickery would rise at every turn to plague him and to nullify his contentions. More directly to the point, petitioner's case itself was discredited. For implicit in the brief but startling exposure before the jury of Mr. Fisher's wrongdoing was an admission that the defense was so devoid of merit as to need gross deception and falsification of the evidence for its support. And it was in that sordid atmosphere that the closing arguments were made, the instructions were given and the case was submitted to the jury for its deliberation."

Judge Delehant's conclusion that the effectiveness of Loyd Grandsinger's trial counsel was destroyed by his gross misconduct in altering a material State's exhibit, and by the action of the special prosecutor in making that misconduct known to the jury before the case was submitted was, we think, fully justified. The Warden and the State of Nebraska are now in no position to claim that the action of the special prosecutor in publicizing the misconduct of Grandsinger's counsel did not have the effect that it was obviously intended to have.

The question for decision, then, is whether, in a capital case tried in a State court, a conviction and death

sentence can, in view of the due process clause of the Fourteenth Amendment, be sustained notwithstanding an occurrence, such as that which took place in the Grandsinger trial, resulting in the deprivation of the effectiveness and usefulness of the defendant's counsel. There can, we think, be no serious doubt as to the answer.

Due process requires that a defendant on trial in a State court upon a serious criminal charge and unable to defend himself shall not be denied or deprived of his fundamental constitutional right to the effective aid and assistance of counsel. See and compare, *Powell* v. *Alabama,* 287 U.S. 45, 71-72; *Avery* v. *Alabama,* 308 U.S. 444, 445-447; *Glasser* v. *United States,* 315 U.S. 60, 70-71; *Williams* v. *Kaiser,* 323 U.S. 471; *House* v. *Mayo,* 324 U.S. 42, 46; *Hawk* v. *Olson,* 326 U.S. 271, 274-279.

It is difficult to imagine how the effectiveness of a defendant's counsel could be more completely destroyed than by causing him to confess before the jury, at the close of the evidence at the trial, that he had been guilty of gross misconduct in having tampered with the State's evidence. Because of a deprivation of due process in his State trial, Loyd Grandsinger stands presently "as a firebrand plucked out of the burning" by the Fourteenth Amendment to the Constitution of the United States.

The judgment appealed from is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.